Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TECK COMINCO METALS, LTD.,

Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, AND STATE OF WASHINGTON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) makes liable "any person who . . . arrange[s] for disposal . . . of hazardous substances . . . by any other party or entity, at any facility . . . from which there is a release . . . of a hazardous substance." 42 U.S.C. § 9607(a)(3)-(4). Petitioner, a Canadian company, disposed of hazardous substances at its facility in Canada in accordance with that country's laws, and without the assistance of any "other person or entity." Some of those substances were carried to the United States by the flow of surface water. The questions presented are:

1. Whether the Ninth Circuit erred in concluding, in derogation of numerous treaties and established diplomatic practice, that CERCLA (and, by extension, other American environmental laws) can be applied unilaterally to penalize the actions of a foreign company in a foreign country undertaken in accordance with that country's laws; and

2. Whether the Ninth Circuit erred in concluding, in direct and acknowledged conflict with the First Circuit, that "arranger" liability under CERCLA does not require the involvement of any "other party or entity."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Teck Cominco Metals, Ltd. is a Canadian corporation; the parent corporation of Teck Cominco Metals, Ltd. is Teck Cominco Limited, also a Canadian corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Teck Cominco Metals, Ltd. respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 452 F.3d 1066. The opinion of the district court (App., *infra*, 29a-59a) is not officially reported but is electronically reported at 2004 WL 2578982.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2006. A timely petition for rehearing was denied on October 30, 2006. App., *infra*, 60a-61a. On January 12, Justice Kennedy extended the time within which to file a petition for writ of certiorari to and including February 27, 2007. No. 06A686. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a) provides in relevant part:

§ 9607. Liability

(a) Covered persons . . .

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable . . . .

Other pertinent provisions of CERCLA are reproduced in the appendix, *infra*, at 62a-67a.

STATEMENT

1. Petitioner is a Canadian corporation that owns and operates a smelting and refining complex in the city of Trail, which is in the province of British Columbia, in the sovereign nation of Canada. The Trail Smelter is located along the banks of the Upper Columbia River, approximately ten miles north of Canada's border with the United States. Today it is the largest lead-zinc smelter in the world. App., *infra*, 106a.

For nearly a century after it was built in 1895, waste generated by the Trail Smelter—known as "slag"—was discharged into the Upper Columbia River. Such disposal activities were, at all times, conducted in accordance with applicable laws of Canada and British Columbia—the governmental entities with authority to regulate operations at the Trail Smelter. During the twentieth century, such disposals were common among industrial plants sited along the Canadian and American banks of the Upper Columbia River. *See* App., *infra*, 71a ("Sources [of pollution in the Upper Columbia River] . . . include releases from mining and milling operations, fertilizer production, smelting operations, pulp and paper production, sewage treatment plants, and other industrial activities").

The Trail Smelter stopped discharging slag directly into the river in 1995. *See* Superfund Technical Assessment and Response Team, Region 10, U.S. EPA, TD: 01-02-0028, Upper Columbia River Expanded Site Inspection Report 2-13 (2003) ("2003 Report").

Residents of Washington State have periodically complained of pollution emanating from the Trail Smelter. In the 1920s, for example, air currents regularly carried sulfur dioxide emissions from the Trail Smelter south into the United States, triggering complaints by the citizens of Northport, Washington. Those complaints were resolved by diplomatic negotiations and, eventually, binding arbitration between governments. *See infra* at 10-11.

In 1999, the Confederated Tribes of the Colville Indian Reservation, which is located in Washington State, petitioned the U.S. Environmental Protection Agency ("EPA") to conduct an assessment of hazardous-substances contamination of the Upper Columbia River and surrounding lands in northeastern Washington. App., *infra*, 70a. The petition alleged that the Upper Columbia River had been polluted by Canadian and American smelters, pulp mills, and mining operations. *Id.* at 72a. In 2003, EPA issued findings that the U.S. portion of the Upper Columbia River had been contaminated by hazardous substances and that slag discharged from the Trail Smelter, carried downstream by surface water, was the primary source of that contamination. 2003 Report at 8-2.

In December of 2003, EPA issued a Unilateral Administrative Order ("UAO") pursuant to CERCLA § 106(a), 42 U.S.C. § 9606(a) (App. *infra*, 63a-65a), ordering petitioner—a Canadian company with no operations in the United States—to undertake a Remedial Investigation/Feasibility Study ("RI/FS") of the portion of the Upper Columbia River located in the United States. App., *infra*, 68a-69a. Section 106(a) of CERCLA permits the President to issue "such orders as may be necessary to protect public health and welfare and the environment" from an "actual or threatened release of a hazardous substance from a facility." 42 U.S.C. § 9606(a) (App., *infra*, 63a). EPA concluded that the "Upper Columbia River Site"—defined as "the areal extent of contamination *in the United States* associated with the Upper Columbia River, and all suitable areas in proximity to the

contamination necessary for implementation of response action"—was a CERCLA "facility." App., *infra*, 69a, 75a (emphasis added); *see* 42 U.S.C. § 9601(9) (defining a "facility" as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located") (App., *infra*, 62a). EPA further determined that the "potential migration of hazardous substances currently located at or emanating from the Site, . . . constitute actual and/or threatened 'releases.'" App., *infra*, 75a; *see* 42 U.S.C. § 9601(22) (defining "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment") (App., *infra*, 62a-63a).

The President's authority to issue investigation or remediation orders under CERCLA § 106(a) properly extends only to "responsible parties." *See Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004). EPA declared petitioner to be a "responsible party" subject to presidential authority under 42 U.S.C. §§ 9604, 9607, and 9622, which lay out the scope of the President's authority to order remedial actions. App., *infra*, 76a. This legal conclusion was predicated on EPA's factual finding that petitioner had "arranged for disposal of its hazardous substances" by discharging slag "into the Columbia River through several outfalls at the Trail Smelter," located *in Canada*. *Id.* at 72a.

Soon after the entry of the UAO, the Canadian government sent a diplomatic note to the U.S. State Department, expressing grave concern over EPA's "attempt[ ] to enforce . . . [CERCLA] on Teck Cominco Metals, a Canadian company operating in Canadian territory." App., *infra*, 100a. The Canadian government warned that "issuance of the Unilateral Administrative Order may . . . caus[e] transboundary environmental liability cases to be initiated in both Canada and the United States." *Ibid.* Canada urged the United States to withdraw the UAO and to negotiate outside of the coercive framework of CERCLA toward a "mutually acceptable and

enforceable agreement" based on Teck Cominco's longstanding offer "to undertake an environmental and health risk assessment." *Id.* at 100a-101a.

Petitioner thereafter notified EPA that it would not comply with an order premised on the American President's regulatory authority under CERCLA, but reiterated its willingness to enter into an "unequivocal[ ]" and "enforceable" agreement "to assume voluntarily the costs of investigation of the alleged contamination from the Trail Smelter, and the costs of appropriately addressing risks from that contamination." App., *infra*, 103a. EPA never moved to enforce the UAO and in June 2006, EPA and a U.S.-based affiliate of Teck Cominco reached a settlement—outside the CERCLA framework—under which the affiliate would conduct a study of the Site under EPA's supervision. *Id.* at 120a. Pursuant to that settlement, EPA withdrew the UAO. *Ibid.*

2. In July 2004, two residents of the Colville Reservation, Joseph A. Pakootas and Donald R. Michel, brought a citizen suit against petitioner, seeking to compel petitioner to comply with the UAO and to impose on petitioner statutory penalties for its alleged noncompliance. App., *infra*, 105a-112a; *see also* 42 U.S.C. § 9659(a) (providing for citizen suits to enforce "any . . . order which has become effective pursuant to this chapter") (App., *infra*, 67a); *id.* § 9606(b)(1) (providing for fines of up to $25,000 per day for failure to comply with "any order of the President under [Section 9606(a)]") (App., *infra*, 63a). The State of Washington later intervened as a plaintiff, filing a complaint in intervention substantially identical to that filed by Pakootas and Michel. App., *infra*, 113a-119a.

The two complaints closely tracked the UAO's factual findings and legal conclusions. They alleged that petitioner disposed of slag "directly into the Columbia River" in Canada, and that some portion of those hazardous substances migrated "downstream into waters of the United States." App.,

infra, 107a, 115a. The plaintiffs further alleged that a "significant volume" had accumulated on the U.S. side of the border, and that decay of the slag was releasing hazardous substances into the U.S. environment. *Ibid.*

Petitioner moved to dismiss the complaints on the ground, *inter alia*, that it was not a "responsible party" under CERCLA § 107(a). *Se* 42 U.S.C. § 9607(a) (App., *infra*, 65a). Petitioner argued, first, that in light of the strong presumption against the extraterritorial application of U.S. law (*e.g.*, *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*ARAMCO*)), CERCLA should not be construed to extend to a foreign party operating exclusively in a foreign country in compliance with that country's laws. Second, petitioner explained that it could not be liable as an "arranger" under CERCLA because there was no allegation that any "other party or entity" participated in the petitioner's disposal of waste in Canada.

a. The district court denied the motion to dismiss, concluding that petitioner was a potentially responsible "arranger" subject to presidential authority under CERCLA. App., *infra*, 29a-59a.

The district court acknowledged that, because petitioner's disposal activities took place only "at [petitioner's] 'facility' in Canada," App., *infra*, 51a, its ruling amounted to an "extraterritorial application of CERCLA." *Id.* at 55a. Although the district court could locate "no direct evidence that Congress intended extraterritorial application of CERCLA to conduct occurring outside the United States," *id.* at 57a, it nevertheless found that "extraterritorial application of CERCLA is appropriate in this case." *Id.* at 44a. The presumption against extraterritorial application of U.S. law does not apply, the court reasoned, whenever "failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." *Ibid.*

The district court also rejected petitioner's argument that one cannot be a covered "arranger" unless a third party disposes of the hazardous substances generated by the purported "arranger." The district court recognized that "[t]he 'plain language' of § 9607(a)(3) would appear to require another party, other than just the defendant, be involved in the disposal of the hazardous substances." *Id.* at 47a. Nevertheless, the district court held that "'arranger' liability under CERCLA cannot be ruled out for [petitioner]." *Id.* at 49a.

b. The Ninth Circuit affirmed.[1] Addressing the presumption against extraterritorial application of U.S. law, the Ninth Circuit interposed the "threshold question" of "whether this case involves a domestic or extraterritorial application of CERCLA." App., *infra*, 12a. Rejecting the view of the district court, the Ninth Circuit concluded that the UAO represented only a "domestic application of CERCLA," because "the operative event creating a liability under CERCLA is the release . . . of a hazardous substance," *id.* at 19a, and "the actual or threatened release here, the leaching of hazardous substances from slag that settled at the [Upper Columbia River] Site, took place in the United States." *Id.* at 21a. The court of appeals opined that the "location where a party arranged for disposal or disposed of hazardous substances is not controlling for purposes of assessing whether CERCLA is being applied extraterritorially." *Id.* at 20a. Accordingly, the Ninth Circuit did not address petitioner's argument—supported by the Governments of Canada and British Columbia as *amici curiae*—that the definitions of "covered persons" set out in Section 9607(a) should not be considered to apply to a foreign entity operating only in a foreign country in accordance with that country's laws.

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[1] As a threshold matter, the court of appeals concluded that EPA's June 2006 withdrawal of the UAO had not affected its jurisdiction. App., *infra*, 9a n.10. Whatever effect the withdrawal might have had on respondents' claims for injunctive and declaratory relief, "Pakootas's claims for civil penalties and for attorneys' fees are not moot." *Ibid.*

The Ninth Circuit also rejected petitioner's argument that "arranger" liability under Section 9607(a)(3) requires the involvement of a third party. App., *infra*, 23a-28a. The Ninth Circuit declared that the statute "does not make literal or grammatical sense as written," and that the phrase "by any other party or entity" was "ambiguous" and susceptible to multiple interpretations. *Id.* at 23a-24a, 26a. The court of appeals acknowledged that the phrase could be read as modifying the earlier phrase, "disposal or treatment," such that the statute would require "any other party or entity"—*i.e.*, someone other than the person who "owned or possessed" the hazardous substance—to be involved in the "disposal or treatment." *Id.* at 25a. But the court held that "by any other party or entity" also could be read as expanding the clause immediately preceding it, "owned or possessed by such person." This construction "require[d] reading the word 'or' into the provision," thus "modif[ying]" "[t]he text of § 9607(a)(3)" to encompass "'any person who . . . **arranged for disposal** or treatment . . . of hazardous substances **owned** or possessed **by such person [or] by any other party or entity** . . . .'" *Id.* at 24a (emphasis and alteration in original). In electing to rewrite the statute in this fashion, the Ninth Circuit departed company from the First Circuit, which had rejected precisely the textual modification embraced by the Ninth Circuit, and had concluded that "for arranger liability to attach, the disposal or treatment must be performed by another party or entity." *American Cyanamid Co.* v. *Capuano*, 381 F.3d 6, 24 (1st Cir. 2004); *see also* App., *infra*, 25a-26a (rejecting First Circuit's conclusion). CERCLA, the Ninth Circuit said, required "'a liberal judicial interpretation.'" *Id.* at 26a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has decided that American environmental laws can be applied to the activities of a foreign company in a foreign country in compliance with that country's laws. That holding is based on a clear misreading of CERCLA and departs widely from this Court's interpretation of statutes. It also departs from the bilateral diplomacy that has traditionally marked U.S.-Canadian relations and threatens to disrupt our ties with Canada, a key military and economic ally. Moreover, the Ninth Circuit has held that "*arranger*" liability can attach to the unilateral acts of a company in the absence of any *arrangement*. In so doing, the court of appeals created a direct and acknowledged split with the First Circuit.

I. THE NINTH CIRCUIT'S APPLICATION OF U.S. LAW TO CANADIAN CONDUCT DISREGARDS CORE PRINCIPLES OF INTERNATIONAL COMITY

The United States and Canada share a five-thousand-mile border, including approximately 150 rivers and lakes, which constitute over 90 percent of North America's and 20 percent of the world's fresh surface water. Noah Hall, *Bilateral Breakdown: U.S.-Canada Pollution Disputes*, 21-SUM Nat. Res. & Env't 18, 18 (2006). Both are highly industrialized nations and economic activity in one country will have an inevitable impact upon the environment of the other. Indeed, it has been said that "pollution respects no borders." Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail For CERCLA*, 14 N.Y.U. Envtl. L. J. 233, 235 (2006). That pollution can travel long distances means that pollution generated in one nation often will cause effects in another. *See, e.g.*, Environment Canada, *Acid Rain and the facts*, http://www.ec.gc.ca/acidrain/acidfact.html (last visited Feb. 25, 2007) (noting that sulfur dioxide emissions from the United States contribute to "acid rain" conditions in Eastern Canada).

A. The Decision Below Upsets A Century-Old Tradition Of Bilateral Solutions To Transboundary Pollution Problems

Since the Industrial Revolution, the United States and Canada have resolved their transboundary pollution problems bilaterally, including government-to-government diplomatic negotiations and, occasionally, arbitrations between the sovereigns. In the 1909 Boundary Waters Treaty, Great Britain (on behalf of Canada) and the United States established an International Joint Commission ("IJC") and granted it jurisdiction over not only "cases involving the use or obstruction or diversion" of the navigable waters shared by the two nations, but also "any other questions or matters of difference arising between them involving the rights . . . of either in relation to the other or to the inhabitants of the other, along the common frontier." *See* Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, ("1909 Boundary Waters Treaty"), 36 Stat. 2451-52.

In the late 1920s, when sulfur dioxide emissions from the Trail Smelter—the very same smelter at issue in this case—were carried by air currents to Northport, Washington, the United States presented an official complaint to the Government of Canada. *See* D. H. Dinwoodie, *The Politics of International Pollution Control: The Trail Smelter Case*, 27 Int'l J. 219, 221-22 (1971-72). Later that year, the United States suggested that the dispute be submitted to the IJC created by the 1909 Boundary Waters Treaty. *See* John E. Read, *The Trail Smelter Dispute*, 1 Can. Y.B. Int'l L. 213, 214 (1963). In 1932, the IJC recommended an award for damages, but the United States rejected the award as insufficient. Dinwoodie, *supra*, at 227. After two more years of unfruitful bilateral negotiations, the countries agreed to submit the dispute to binding arbitration before a three-member tribunal. Read, *supra*, at 214. The tribunal ultimately affirmed the IJC's award of damages. *Id.* at 214.

The Trail Smelter Case established the now-rudimentary principle of international environmental law that every nation "is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control . . . are conducted so as not to cause significant injury to the environment of another state . . . ." Restatement (Third) of the Foreign Relations Law of the United States § 601(1) (1987); *see also* 1909 Boundary Waters Treaty, 36 Stat. 2450 ("waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other"). When the inhabitants of one nation do cause injury to the environment of another, the injured nation may seek reparations "either through diplomatic channels *or through any procedure to which the two states have agreed.*" Restatement (Third) of the Foreign Relations Law of the United States § 902(1) (emphasis added).

In keeping with these foundational principles of international law, the United States and Canada have continued to search out cooperative solutions to environmental issues of shared concern. In 1978, confronting the pollution of the Great Lakes shared by the two nations, the United States and Canada developed a comprehensive agreement to clean up and protect those natural resources. *See* Great Lakes Water Quality Agreement, U.S.-Can., Nov. 22, 1978, 30 U.S.T. 1383. Later, the United States and Canada entered into an agreement that specifically provided that disputes between the United States and Canada on air quality issues should be handled diplomatically in the first instance, and if intractable, should be submitted by the sovereigns to binding arbitration. *See* Agreement Between the Government of the United States of America and the Government of Canada on Air Quality, U.S.-Can., Mar. 13, 1991, 30 I.L.M. 676. And after the ratification of the North American Free Trade Agreement, the United States, Canada, and Mexico entered into a series of side agreements that provide for environmental cooperation

and, significantly, stipulate procedures by which the countries can address another nation's failure to enforce its own environmental laws. *See* North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (pts. 1-3); 32 I.L.M. 605 (pts. 4-8) (entered into force Jan. 1, 1994).

It was against this backdrop of cooperative solutions to transboundary environmental problems—a backdrop of which Congress certainly was aware, *see* United States-Canadian Negotiations on Air Quality, Pub. L. No. 95-426, 92 Stat. 990 (1978) (recognizing that "the United States and Canada have a tradition of cooperative resolution of issues of mutual concern which is nowhere more evident than in the environmental area")—that Congress enacted CERCLA. *Cf. Chew Heong* v. *United States*, 112 U.S. 536, 550 (1884) ("When the act of 1882 was passed, congress was aware of the obligation this government had recently assumed, by solemn treaty"); *see generally Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988) ("Congress understands the state of existing law when it legislates").

B. The Decision Below Improperly Disregards The Presumption Against Extraterritorial Application Of U.S. Law

This Court has consistently adhered to the "longstanding principle of American law" that "'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *ARAMCO*, 499 U.S. at 248 (quoting *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949)). This presumption against extraterritoriality flows naturally from the "commonsense notion that Congress generally legislates with domestic concerns in mind," *Smith* v. *United States*, 507 U.S. 197, 204 n.5 (1993), and, as this Court explained in *ARAMCO*, "serves to protect against unintended clashes between our laws and those of other nations." 499 U.S. at 248; *see also American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909) (Holmes, J.) (explaining that "if [another jurisdiction] should happen to

lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent").

This case represents a very real "clash" between the laws of separate sovereigns. Canada (at the national level) and British Columbia (at the provincial level) regulate petitioner's Canadian operations, including discharges from the Trail Smelter. Those governments have made clear through both diplomatic and judicial channels that they do not agree with EPA's attempt to exercise unilateral authority over petitioner pursuant to CERCLA. *See, e.g.*, Gov't of Canada C.A. Br. 3 ("The Government of Canada has a strong interest in preserving from interference, by private litigation in U.S. courts, its sovereign right to regulate Canadian persons and companies operating in Canada"); *see also* App., *infra*, 101a. Only if the statute unequivocally *required* the exercise of such authority would the Judiciary be warranted in disregarding the views of our neighbors to the North. Of course it does not.

To overcome the presumption against extraterritoriality, the intention of Congress to apply the statute beyond the borders of the United States must be "clearly expressed." *ARAMCO*, 499 U.S. at 248 (internal quotation omitted). The "possibility" that Congress anticipated an extraterritorial application "is not a substitute for the affirmative evidence of intended extraterritorial application that our cases require." *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 176 (1993); *see also Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) (holding that Labor Management Relations Act did not apply to a labor dispute involving a foreign-flagged ship because Congress had not "clearly expressed" its "affirmative intention" to reach such conduct). A *clear* expression of congressional intent is needed because a decision to apply U.S. law extraterritorially inevitably reverber-

ates through the "delicate field of international relations." *Benz*, 353 U.S. at 147. "The Judiciary has neither aptitude, facilities nor responsibility" for decisions of this nature. *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

A corollary to this requirement of "affirmative evidence" of congressional intent, *see Sale*, 509 U.S. at 176, is that courts must strictly construe statutes in light of the presumption against extraterritoriality. Thus, in *Small v. United States*, 544 U.S. 385 (2005), the Court held that a general term such as "any court" presumptively "refers only to domestic courts, not to foreign courts." *Id.* at 394. And in *F. Hoffmann-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004), this Court instructed that as long as a "statute's language reasonably permits an interpretation " that avoids extraterritorial application, a court "should adopt it." *Id.* at 174. Indeed, even where "the more natural reading of the statutory language" would permit extraterritorial application of the statute, courts should reject that construction unless the language itself demonstrates that the court "*must* accept that reading." *Ibid.*

1. The Ninth Circuit held that the imposition of liability on a Canadian corporation for disposal activities undertaken exclusively in Canada "involves a domestic application of CERCLA," and thus that the presumption against extraterritoriality did not apply. App., *infra*, 3a. That conclusion is incorrect for at least three reasons.

First, the notion that the court of appeals was applying CERCLA only domestically is bottomed on its deeply flawed premise that "the operative event creating a liability under [Section 9607(a)(3) of] CERCLA is the release or threatened release of a hazardous substance." App., *infra*, 19a. Based on that premise, the Ninth Circuit concluded that "[t]he location where a party arranged for disposal or disposed of hazardous substances is not controlling for purposes of assessing

whether CERCLA is being applied extraterritorially." *Id.* at 20a. But contrary to the Ninth Circuit's reasoning, CERCLA does not create, upon the release of a hazardous substance, "a liability" in the abstract. Section 9607 of CERCLA—entitled "Liability"—imposes liability for cleanup costs on "any person" who engages in particular categories of *conduct*. *See* 42 U.S.C. § 9607(a) (App., *infra*, 65a). To be sure, just as there can be no crime of murder without a death, there can be no liability under CERCLA without a release. *See id.* § 9607(a)(4). But that a release is *necessary* for CERCLA liability, or a death necessary for murder liability, hardly makes either *sufficient* to establish that liability. Liability under CERCLA is triggered only by the *conduct* described in Section 9607(a)—which, in this case, occurred entirely in Canada.

Second, and relatedly, this Court often enough has recognized that the canon against extraterritorial application of U.S. law applies whenever the statute purports to proscribe conduct outside of the United States. *See Smith*, 507 U.S. at 203-04 (applying canon to hold that Federal Tort Claims Act does not apply to claims arising in Antarctica); *ARAMCO*, 499 U.S. at 249-51 (applying canon to hold that Title VII of the Civil Rights Act of 1964 does not regulate the employment practices of American firms employing American citizens abroad). If, as in *Smith* and *ARAMCO*, the extraterritoriality canon can prevent a U.S. statute from reaching the overseas conduct of a *U.S. person*, it applies *a fortiori* to restrict statutes from reaching the overseas conduct of *foreign persons*. *See, e.g.*, *Empagran*, 542 U.S. at 174 (applying canon against extraterritoriality to Sherman Act claim against foreign defendant for price-fixing activities outside of the United States).

Third, even if the Ninth Circuit were correct that the application of CERCLA in this case was, in some sense, domestic, it would not follow that the court of appeals was at liberty to disregard the canon against extraterritoriality. In

Small, this Court recognized that "the presumption against extraterritorial application does not apply directly to th[e] case" (which reviewed a criminal conviction for being a felon in possession of a firearm in the United States), but nevertheless found that an "ordinary assumption" "about the reach of domestically oriented statutes" necessarily guided its construction of the general term "any court." 544 U.S. at 389-90. In the absence of any indication that Congress intended the general term to include foreign courts, this Court held that the term must be construed to "refer[ ] only to domestic courts, not to foreign courts." *Id.* at 394.[2]

2. Respondents also argued below—as the district court had held, App., *infra*, 38a—that the presumption against extraterritorial application of U.S. law did not apply "where the failure to extend the scope of the statute to a foreign setting will result in adverse effects in the United States." Pakootas C.A. Br. 20 (quoting *Environmental Def. Fund, Inc.* v. *Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993)). Respondents argued that this exception, which supposedly is triggered

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[2] Addressing *Small*, the court of appeals appeared to hold that Congress intended to include foreign corporations within CERCLA's general term "any person." App., *infra*, 17a; *see also* 42 U.S.C. § 9601(21) (defining "person"). But the question before the court of appeals was whether Congress intended the term "any person who arranges for disposal or treatment" to include persons who dispose of waste outside of the United States. Tellingly, the Ninth Circuit avoided any straightforward or detailed analysis of this Court's decision in *Small*, preferring instead to determine whether application of CERCLA to foreign corporations would pass muster under *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610 (1818), on which "[t]he decision in *Small* was based in part." App., *infra*, 16a. *Small*, however, cited *Palmer* only in a six-case string cite. And *Palmer* itself dealt with the reach of a statute addressing piracy on the high seas. 16 U.S. at 630. The Court concluded that a crime of robbery on the high seas *on a vessel belonging to a foreign state* against foreign persons was not within the ambit of the relevant statute. *Id.* at 633-34. *Palmer* is thus another example of a case in which the Court did not read Congress as intending a statute to reach acts undertaken in a foreign jurisdiction.

whenever a plaintiff alleges that foreign conduct has adverse effects in the United States, is rooted primarily in this Court's decision in *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 287-88 (1952). Pakootas C.A. Br. 21-23; *see also* App., *infra*, 19a. But *Steele* does not remotely establish the encompassing exception which the district court envisioned.

In *Steele*, the Court confronted a trademark infringement action brought against a U.S. citizen and resident who manufactured and sold counterfeit watches in Mexico. 344 U.S. at 284-85. Stressing that the United States can "govern[ ] the conduct of *its own citizens* . . . in foreign countries," the *Steele* Court noted that Steele's "purchases in the United States . . . were essential steps in the course of business consummated abroad." *Id.* at 285-86, 287 (emphasis added). The Court further noted that "by his own deliberate acts, *here and elsewhere*, [Steele has] brought about forbidden results within the United States." *Id.* at 288 (internal quotation marks omitted and emphasis added). Holding him liable for such acts, the Court concluded, would not "impugn foreign law" or "interfere[ ] with the sovereignty of another nation." *Id.* at 285. In contrast, petitioner is *not* a U.S. citizen, did *not* commit any acts in the U.S., and holding it liable *would* disrupt foreign relations. In these circumstances, *Steele* does not apply. *See Vanity Fair Mills, Inc.* v. *T. Eaton Co.*, 234 F.2d 633, 642 (2d Cir. 1956); *McBee* v. *Delica Co.*, 417 F.3d 107, 118 (1st Cir. 2005).

Moreover, even when Congress has made clear that a statute applies to foreign conduct—as it has with the Sherman Act, *see Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993)—the presumption remains relevant to determining the *extent* of a statute's extraterritorial reach. *See Empagran*, 542 U.S. at 173-74 (applying presumption to limit Sherman Act's application to foreign conduct). Particularly where the extraterritorial application advanced by a party will cause "unreasonable interference with the sovereign authority of other nations," *id.* at 164, in the absence of

"affirmative evidence" that Congress intended the statute to reach the foreign conduct at issue, *Sale*, 509 U.S. at 176, a court "*must* accept" any "reasonably permi[ssible]" reading of the statutory language that will avoid that discordant result. *Empagran*, 542 U.S. at 174 (emphasis in original).

C. The Decision Below Misconstrues CERCLA's Text and Structure

Here, CERCLA's "statutory language" not only "reasonably permits an interpretation" that avoids its extraterritorial application, but the relevant statutory language indisputably compels that interpretation.

Petitioner cannot be held liable under CERCLA unless it is a "covered person" under Section 9607(a). *See Cooper Indus.*, 543 U.S. at 161. The court of appeals held that petitioner is a "covered person" because Section 9607(a)(3) "applies to 'any person' who arranged for the disposal of hazardous substances." App., *infra*, 16a. This reading badly misapprehends the statutory text.

In relevant part, Section 9607(a)(3) is a sentence fragment that provides that "any person who by contract, agreement, or otherwise arranged for disposal . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility." 42 U.S.C. § 9607(a)(3). Subsections (a)(1) and (a)(2) likewise are sentence fragments. *See, e.g.*, 42 U.S.C. § 9607(a)(1) ("the owner and operator of a vessel or a facility"). The courts of appeals uniformly have recognized that the last clause of Section 9607(a)(4)—"from which there is a release . . . of a hazardous substance, shall be liable for"—modifies *all four* subparts of Section 9607(a). *See, e.g.*, *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1043 n.16 (2d Cir. 1985).[3] Thus, the arranger liability provision actually reads as follows:

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[3] As the Second Circuit explained: "The phrase 'from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance' is incorporated in and seems to flow as if

> any person who by contract, agreement, or otherwise arranged for disposal . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . .from which there is a release . . . of a hazardous substance, shall be liable for—.

42 U.S.C. § 9607(a)(3)-(4).

To be a covered "arranger," therefore, one must "arrange[ ] for *disposal* . . . of hazardous substances . . . *at any facility . . . from which there is a release*." *Id.* (emphases added). This language makes absolutely clear that the "disposal" must take place at the same "facility" "from which there is a release." The statutory text does not permit liability to attach when a person arranges for disposal at one "facility," and the pertinent "release" emanates from some other "facility." Yet that is precisely the allegation in this case: The "disposal" occurred at a "facility" in Canada, while the "release" emanated from a different "facility" entirely within the United States. *See* App., *infra*, 14a ("The Order defines the facility as being entirely within the United States").

With plaintiffs and the Ninth Circuit having defined the relevant "facility . . . from which there is a release" as being "entirely within the United States," App., *infra*, 37a, CERCLA "arranger" liability could attach only if petitioner "arranged for disposal" of its hazardous substances at *that same U.S. facility*. But the Ninth Circuit's opinion is ex-

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[Footnote continued from previous page]
it were a part only of subparagraph (4), but it is quite apparent that it also modifies subparagraphs (1)-(3) inclusive." *Shore Realty Corp.*, 759 F.2d at 1043 n.16. The Second Circuit reviewed the relevant statutory history and noted that originally "the commencing clause 'from which there is a release' was printed as a new line." *Ibid.*; *see also Control Data Corp.* v. *S.C.S.C. Corp.*, 53 F.3d 930, 934 n.7 (8th Cir. 1995) (same); *United States* v. *Alcan Aluminum Corp.*, 964 F.2d 252, 257 n.4 (3d Cir. 1992) (same); *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1151 n.4 (1st Cir. 1989) (same).

pressly premised on the allegation that "Teck . . . arrang[ed] in *Canada* for disposal of the slag." *Id.* at 16a (emphasis added). And rightly so: The UAO is absolutely clear that petitioner's disposal activities took place in Canada "through several outfalls at the Trail Smelter," *id.* at 72a, and the operative complaints similarly acknowledge that, only after petitioner disposed of its waste slag in Canada, was it "carried downstream into the waters of the United States." *Id.* at 107a, 115a. Where the CERCLA "facility" is located in the United States, a correct reading of CERCLA's "arranger" liability provision does not permit disposal activities outside of the United States to trigger liability.[4]

It was only by reading Section 9607(a)(3) in isolation from the last clause of subsection (a)(4)—contrary to the otherwise unanimous view of the Circuits—that the Ninth Circuit could find that petitioner's disposal of slag in Canada could make petitioner liable for a subsequent release from a facility in the United States. By construing CERCLA's arranger liability provision to reach persons who dispose of

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[4] Any suggestion that, because it knew some portion of its slag would be carried into the United States, Teck Cominco should be deemed to have disposed of its waste in the United States would have been legally defective. Such a suggestion would require a court to construe the term "disposal" to include passive migration of waste subsequent to its initial introduction into the environment. The en banc Ninth Circuit rejected a similar passive migration claim in *Carson Harbor Vill., Ltd.* v. *Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001). *See also* App., *infra*, 19a n.17 ("'passive' terms . . . are not included in the definition of 'disposal'") (quoting *Carson Harbor Vill.*, 270 F.3d at 878 (internal quotation marks omitted)); *see also United States* v. *150 Acres of Land*, 204 F.3d 698, 706 (6th Cir. 2000) (concluding that absent "any evidence that there was human activity involved in whatever movement of hazardous substances occurred on the property," there is no "disposal"); *ABB Indus. Sys., Inc.* v. *Prime Tech., Inc.*, 120 F.3d 351, 357-58 (2d Cir. 1997) ("gradual spreading of hazardous chemicals already in the ground" is not "disposal"); *United States* v. *CDMG Realty Co.*, 96 F.3d 706, 722 (3d Cir. 1996) ("[T]he passive spreading of contamination in a landfill does not constitute 'disposal' under CERCLA").

waste outside the United States, the Ninth Circuit disregarded this Court's clear instruction that, in the absence of evidence of congressional intent to the contrary, general terms should be construed to refer only to domestic persons or conduct. *See Small*, 544 U.S. at 394. And by rejecting a construction of the statute limited to domestic conduct that was not only "reasonably permi[ssible]," but indeed *compelled* by the plain text of the statute, the Ninth Circuit disregarded this Court's teaching that courts "should adopt" such constructions. *Empagran*, 542 U.S. at 174. The Ninth Circuit's refusal to faithfully apply these controlling authorities warrants this Court's review. *See* Sup. Ct. R. 10(c).

D. The Decision Below Threatens To Disrupt The Foreign Policy Of The United States

If there were *any* doubt that CERCLA should not be construed to apply to the foreign operations of a foreign company conducted pursuant to foreign law, it would be dispelled by the longstanding rule that American statutes should not be read as transgressing the law of nations. *See, e.g.*, *Hartford Fire Ins.*, 509 U.S. at 815 ("statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law"); *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

The Ninth Circuit's conclusion that EPA can *unilaterally* impose CERCLA liability on a Canadian company doing business in Canada in compliance with Canadian law, over the strong objections of the Canadian national and provincial governments, would wreck the elegant bilateralism that has distinguished U.S.-Canadian environmental relations for the past century. The Ninth Circuit's decision, if allowed to stand, would usurp the foreign-relations powers of the political branches and could provoke retaliatory actions against American interests by Canada or her courts. And it would do

so entirely unnecessarily, because the ordinary presumption against the extraterritorial effect of American law is sufficient cause to construe the statute in a way that both effectuates the intent of Congress and avoids a crisis of international comity.

Private litigation over this and similar transboundary pollution disputes would place at risk the President's ability to conduct foreign policy, because the Executive's reasoned policy decisions regarding America's dealings with other nations would be supplanted by the choices of self-interested litigants. Particularly where environmental issues are concerned, the formulation of foreign policy requires the balancing of many possibly conflicting considerations. *See, e.g.*, Press Release, President Bush Discusses Global Climate Change (June 11, 2001) (last visited Feb. 25, 2007), http://www.whitehouse.gov/news/releases/2001/06/print/20010611-2.html (observing that adherence to the Kyoto Protocol on global climate change would have a negative economic impact within the United States). And indeed, in some circumstances, the President's foreign policy goals may dictate the temporary subordination of environmental concerns so that other more pressing matters may be addressed. For example, the President might find it difficult to press the Canadian government to continue its military presence in Afghanistan if Canadians were preoccupied with the prospect of being sued by EPA and private U.S. parties in American courts for conduct that occurred in Canada and in compliance with Canadian law.

While the President (and Congress) are well suited to the balancing of several policy considerations, it is universally acknowledged that "the Judiciary has neither aptitude, facilities nor responsibility," *Chicago & S. Air Lines*, 333 U.S. at 111, to navigate "the[se] possibilities of international discord." *Benz*, 353 U.S. at 147. Yet "international discord" is precisely what the Ninth Circuit's decision has sown, and will continue to sow. *See* Gov't of Canada C.A. Br. 3. With

a single decision, a three-judge panel of one intermediate appellate court has deeply undermined the elaborate bilateral framework agreed to by sovereign governments over long decades of negotiations.

Moreover, it is not just American relations with the government of Canada that could be affected by extraterritorial application of CERCLA. The United States shares a long southern border with Mexico. Many of America's coastal States (Alaska, for instance) are close to territory controlled by other sovereigns. And mercury emitted by smokestacks in Asia can ride the prevailing winds across the Pacific Ocean before being deposited in the lakes and streams of California. *See, e.g.*, Douglas J. Steding & A. Russell Flegal, *Mercury Concentrations in Coastal California Precipitation: Evidence of Local and Trans-Pacific Fluxes of Mercury to North America*, 107 J. Geophysical Res. ACH 11-1, 11-6 (2002). Even if only a relatively small amount of the hazardous substances were attributed to the Asian source, that could be enough both to convert that foreign entity into a "potentially responsible party" subject to Section 113 contribution actions and to permit imposition of liability for cleanup costs. *See* 42 U.S.C. § 9613(f)(1) (App., *infra*, 66a). The Ninth Circuit's decision thus threatens to interfere the Executive's ability to conduct foreign policy not only within North America, but anywhere air and ocean currents may carry pollutants—potentially, anywhere in the world.

Committing transboundary pollution disputes to private litigation would, in the long run, have a deleterious effect on U.S. interests. The Ninth Circuit's extraterritorial application of CERCLA could cause other nations to enact or interpret reciprocal laws to make U.S. polluters liable for the foreign effects of their U.S. activities. *See, e.g.*, *Barclays Bank PLC* v. *Franchise Tax Bd. of California*, 512 U.S. 298, 324 n.22 (1994) (noting the "retaliatory legislation" enacted by Great Britain in response to California's enactment of worldwide income reporting requirement). And, given the Ninth Cir-

cuit's large size and the great length of its borders with Canada and Mexico, that would remain the case even if no other American court adopted the Ninth Circuit's construction of the statute. Indeed, the Canadian government has already foreshadowed such a result, warning in its diplomatic note that the UAO "may set an unfortunate precedent, by causing transboundary environmental liability cases to be initiated in *both Canada and the United States*." App., *infra*, 100a (emphasis added).

U.S. interests would suffer gravely under the Ninth Circuit regime. The United States is a net exporter of certain types of pollution. *See, e.g.*, Environment Canada, *supra*, (observing that, in the year 2000, the United States emitted six times as much sulfur dioxide as Canada). It accordingly stands to reason that U.S. polluters may cause more environmental problems in foreign nations than foreign polluters cause in the United States. If Canada and other nations were to enact or enforce legislation similar to the court of appeals' interpretation of CERCLA, U.S. interests could send abroad more money to clean up foreign lands than they would recover from foreign entities for the cleanup of American lands.

The decision below thus portends both to constrain the President's ability to conduct foreign policy and to consign U.S. firms to underwrite massive environmental cleanup efforts in Canada and beyond. The fact that the Ninth Circuit proffered no basis whatever for believing that Congress intended such hugely significant and untoward results marks this case as one of exceptional importance warranting this Court's review.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE FIRST CIRCUIT'S CONCLUSION THAT "ARRANGER" LIABILITY REQUIRES THE INVOLVEMENT OF A THIRD PERSON

Even if this case did not raise an exceedingly grave question of international relations, which it does, it would warrant review because the decision below creates a direct conflict of federal appellate authority on one of CERCLA's core liability provisions.

1. In *American Cyanamid Co.* v. *Capuano*, 381 F.3d 6 (1st Cir. 2004), the First Circuit considered whether brokers of waste—individuals who facilitated the disposal of waste generated by another party—could be liable as "arrangers." The defendants argued that, under the plain language of Section 9607(a)(3), they could not be liable as an arranger unless they "owned or possessed" the hazardous substances that were subsequently released in the environment. 381 F.3d at 23; *see also* 42 U.S.C. § 9607(a)(3) ("any person . . . who arrange[s] for disposal . . . of hazardous substances owned or possessed by such person"). The plaintiff, on the other hand, argued that the defendants could be held liable as an "arranger" whether or not they "owned or possessed" the hazardous substances. 381 F.3d at 23-24. The plaintiff contended that the clause "by any other party or entity" expands disjunctively the preceding clause—"owned or possessed by such person"—such that "any person" could be liable for arranging for the disposal of hazardous substances "owned or possessed by such person [or] *by any other party or entity*." *Id.* at 23; *see also Am. Cyanamid Co.* v. *Capuano*, No. 03-2143, Br. of Appellee at 67-68.

The First Circuit flatly rejected the plaintiff's argument. "The sentence structure of § 9607(a)(3)," the First Circuit concluded, "makes it clear" that "'by any other party or entity'" "modif[ies] the words 'disposal or treatment,'" and "clarifies that, for arranger liability to attach, the disposal or

treatment must be performed *by another party or entity*." 381 F.3d at 24 (emphasis added). The "plain language of the statute" mandates that an "arranger" have owned or possessed the hazardous substances in issue. *Id.* at 23-24.[5]

The First Circuit's construction, moreover, was in accord with the substantially uniform view of the Circuits. *GenCorp, Inc.* v. *Olin Corp.*, 390 F.3d 433, 448 (6th Cir. 2004) ("the statute requires ownership or possession of the waste"); *Morton Int'l, Inc.* v. *A.E. Staley Mfg. Co.*, 343 F.3d 669, 677 (3d Cir. 2003) ("First, proof of ownership, or at least possession, of the hazardous substance is required by the plain language of the statute"); *Raytheon Constructors Inc.* v. *Asarco Inc.*, 368 F.3d 1214, 1219 (10th Cir. 2003) ("To be held liable under CERCLA as an arranger, a party must . . . 'own' or 'possess' the hazardous substance at issue"); *United States* v. *Vertac Chem. Corp.*, 46 F.3d 803, 810 (8th Cir. 1995) ("Liability under § 9607(a)(3) requires, among other things, that the hazardous substances be 'owned or possessed by' the person who arranged for the disposal"). *But see Cadillac Fairview/Cal., Inc.* v. *United States*, 41 F.3d 562, 565 (9th Cir. 1994) ("Liability is not limited to those who own the hazardous substances, who actually dispose of or treat such substances, or who control the disposal or treatment process").

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[5] Notwithstanding the plaintiffs' erroneous construction of the statute, the First Circuit affirmed the district court's imposition of "arranger" liability, holding that the facts found by the district court sufficed to establish defendants' "constructive possession of the waste." *Id.* at 25. The court's conclusion that "the disposal or treatment must be performed by a third party," cannot, however, be dismissed as mere *dicta*. *Id.* at 24. That conclusion followed ineluctably from the First Circuit's interpretation of "by any other party or entity" as modifying "disposal or treatment"—a construction that is binding on the courts subject to the First Circuit's appellate supervision. *See, e.g.*, *Eulitt* v. *Maine*, 386 F.3d 344, 349 (1st Cir. 2004).

2. The Ninth Circuit looked at the same text as the First Circuit and adopted precisely the construction that the First Circuit rejected. App., *infra*, 25a-26a. Echoing the reasoning of the First Circuit, petitioner argued that the clause "'by any other party or entity'" modifies "'disposal or treatment'" and "clarifies that, for arranger liability to attach, the disposal or treatment must be performed by another party or entity." *American Cyanamid*, 381 F.3d at 24; *see* Pet. C.A. Br. 38-9. The Ninth Circuit rejected that construction, holding that, rather than modify "disposal or treatment," "by any other party or entity" should be read as a disjunctive clause expanding upon "owned or possessed by such person." App., *infra*, 24a.[6]

In the Ninth Circuit's view, "[t]he text of § 9607(a)(3)" should be "modified" to read, "any person who . . . arranged for disposal or treatment . . . of hazardous substances **owned** or possessed **by such person [or] by any other party or entity** . . . ." App., *infra*, 24a (emphasis in original). The Ninth Circuit thus expressly—and unilaterally—inserted into the statute a word that the political branches did not see fit to include, in derogation of the settled principle that "[courts]

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[6] The Ninth Circuit justified its textual modification, in part, on the basis that the First Circuit's construction "would leave a gaping and illogical hole in the statute's coverage." App., *infra*, 26a. Specifically, the court of appeals fretted that a generator of waste who "disposed of the waste on the property of another"—the so-called "midnight dumper"—could escape liability. *Ibid.* It is well-established, though, that a person who disposes of waste on another's property may be held liable as an "operator" of that "facility" under 42 U.S.C. § 9607(a)(2) (App., *infra*, 65a). *See, e.g.*, *American Cyanamid*, 381 F.3d at 23; *see also United States* v. *Bestfoods*, 524 U.S. 51, 66 (1998) (defining operators as those who "manage, direct, or conduct operations specifically related to pollution"). And, contrary to the suggestion in the decision below, in the Ninth Circuit at least, a generator who transports his own waste may be held liable as one who "accepted any hazardous substances for transport" under 42 U.S.C. § 9607(a)(4). *See Pritikin* v. *Department of Energy*, 254 F.3d 791, 795 (9th Cir. 2001).

have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision." *United States* v. *Temple*, 105 U.S. 97, 99 (1882).

The Ninth Circuit thus adopted exactly the textual "modifi[cation]" that the First Circuit rejected as "clear[ly] . . . [in]correct." *Am. Cyanamid*, 381 F.3d at 24. The appellate adoption of mutually exclusive interpretations of a provision of CERCLA is, of course, a sufficient basis for a grant of certiorari. *See, e.g.*, *United States v. Atlantic Research Corp.*, 127 S. Ct. 1144 (2007) (order granting certiorari). Here, furthermore, the need for this Court's review is amplified by the fact that the First and Ninth Circuits' mutually exclusive interpretations of "by any other party or entity" implicate two separate aspects of CERCLA "arranger" liability.

First, in adopting its countertextual construction, the Ninth Circuit—concededly—set itself at loggerheads with the First Circuit's conclusion that the "by any other party or entity" clause confirmed that a third party—someone other than he who "otherwise arrange[s] for disposal"—must dispose of the hazardous substances at issue. *Compare* App., *infra*, 28a ("the arranger element can be met when disposal is not arranged 'by any other party or entity'") *with Am. Cyanamid*, 381 F.3d at 24 ("the disposal or treatment must be performed by another party or entity"); *cf. United States* v. *Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996) ("'[o]therwise arranged' is a general term following in a series of two specific terms and embraces the concepts similar to those of 'contract' and 'agreement'").

Second, in holding that "'by any other party or entity' refers to ownership of the waste, such that one may be liable under § 9607(a)(3) if they arrange for disposal of their own waste or someone else's," App., *infra*, 28a, the Ninth Circuit deepened a pre-existing circuit conflict on the question whether an "arranger" must have owned or possessed the

waste at issue. As noted *supra* at 26, in the First, Third, Eighth, and Tenth Circuits (at least), arranger liability extends only to persons who "owned or possessed" the hazardous substances." *E.g.*, *Morton Int'l*, 343 F.3d at 677 ("First, proof of ownership, or at least possession, of the hazardous substance is required by the plain language of the statute"). In the Ninth Circuit, however, arranger liability may reach to *any* person who "otherwise arrange[s] for disposal or treatment . . . hazardous substances," regardless of their ownership or possession of the waste.[7]

Thus, as things now stand, one can be held liable in the Ninth Circuit as a responsible "arranger" absent both the involvement of a third party and any ownership or possession the hazardous substances in issue; but that same person, if sued in the First Circuit, could not be held so responsible. A single company with nationwide operations, therefore, could be subject to CERCLA penalties if sued in Washington but not in Maine—even for the identical conduct. Such a state of affairs is antithetical to the uniform remedial scheme that Congress envisioned in enacting CERCLA. This direct and acknowledged conflict warrants review and resolution by this Court.

CONCLUSION

In light of the patent incorrectness of the decision below, the conflict it creates with prior decisions, and its potential to disrupt international relations, the petition for a writ of certiorari should be granted. At minimum, the Court should invite the Solicitor General to explain whether the President actu-

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[7] This construction seems to have rendered irrelevant the statutory phrase "owned or possessed by such person [or] by any other party or entity." On the Ninth Circuit's view, omission of that language does not alter the ambit of the statute. But this Court has long held that that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) (internal quotation omitted).

ally supports such an unprecedented, and potentially deleterious, expansion of American authority, in derogation of the statute enacted by Congress and the canons of construction adopted by this Court.

Respectfully submitted.

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February 27, 2007

APPENDIX

APPENDIX A

Joseph A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; Donald R. Michel, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; State of Washington, Plaintiffs–Appellees,

v.

TECK COMINCO METALS, LTD., a Canadian corporation, Defendant–Appellant.

No. 05–35153.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Dec. 5, 2005.

Filed July 3, 2006.

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Rex S. Heinke, Akin Gump Strauss Hauer & Feld LLP, Los Angeles, CA, for amici Canadian Chamber of Commerce and the Mining Association of Canada.

Brian Hembacher, Deputy Attorney General, Los Angeles, CA, for amici People of the State of California ex rel. Bill Lockyer, Attorney General for the State of California, and the States of Arizona, Idaho, Montana and Oregon.

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Rob Roy Smith, Morisset Schlosser Jozwiak & McGaw, Seattle, WA, for amicus Okanagan National Alliance in support of plaintiffs-appellees.

Catherine E. Stetson, Hogan & Hartson LLP, Washington, D.C., for amici National Mining Association and the National Association of Manufacturers.

Martin Wagner, Earthjustice, Oakland, CA, for amici Sierra Club and Sierra Club of Canada.

Shannon D. Work, Funke & Work, Coeur d'Alene, ID, for amicus Spokane Tribe of Indians.

Appeal from the United States District Court for the Eastern District of Washington; Alan A. McDonald, Senior District Judge, Presiding. D.C. No. CV–04–00256–AAM.

Before: RONALD M. GOULD and MARSHA S. BERZON, Circuit Judges, and WILLIAM W SCHWARZER,* District Judge.

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* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

GOULD, Circuit Judge:

Joseph A. Pakootas and Donald R. Michel (collectively "Pakootas") filed suit to enforce a Unilateral Administrative Order (Order) issued by the United States Environmental Protection Agency (EPA) against Teck Cominco Metals, Ltd. (Teck), a Canadian corporation. The Order requires Teck to conduct a remedial investigation/feasibility study (RI/FS) in a portion of the Columbia River entirely within the United States, where hazardous substances disposed of by Teck have come to be located. We decide today whether a citizen suit based on Teck's alleged noncompliance with the Order is a domestic or an extraterritorial application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675. Further, we address Teck's argument that it is not liable for having "arranged for disposal" of hazardous substances because it disposed of the hazardous substances itself, rather than arranging for disposal "by any other party or entity." § 9607(a)(3).[1] We hold that because CERCLA liability is triggered by an actual or threatened release of hazardous substances, and because a release of hazardous substances took place within the United States, this suit involves a domestic application of CERCLA. Further, we reject Teck's contention that it is not liable under § 9607(a)(3) because it disposed of the hazardous substances itself.

I

We consider an interlocutory appeal of the denial of Teck's motion to dismiss.[2] In August of 1999, the Colville Tribes petitioned the EPA under § 9605 to conduct an as-

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[1] Unless otherwise indicated, statutory citations herein are to Title 42 of the United States Code.

[2] Because this appeal follows denial of a motion to dismiss, we take the facts as stated in the complaint as true and in the light most favorable to Pakootas. *See Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996).

sessment of hazardous substance contamination in and along the Columbia River in northeastern Washington state. The EPA began the site assessment in October 1999, and found contamination that included "heavy metals such as arsenic, cadmium, copper, lead, mercury and zinc." *In re Upper Columbia River Site*, Docket No. CERCLA–10–2004–0018, at 2 (Unilateral Administrative Order for Remedial Investigation/Feasibility Study Dec. 11, 2003), *available at* http://yosemite.epa.gov/R10/CLEANUP.NSF/UCR/Enforcement [hereinafter UAO]. The "EPA also observed the presence of slag, a by-product of the smelting furnaces, containing glassy ferrous granules and other metals, at beaches and other depositional areas at the Assessment Area." *Id.* at 2–3. The EPA completed its site assessment in March of 2003, and concluded that the Upper Columbia River Site (the Site)[3] was eligible for listing on the National Priorities List (NPL).[4]

Teck owns and operates a lead-zinc smelter ("Trail Smelter") in Trail, British Columbia.[5] Between 1906 and

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[3] The "Upper Columbia River Site" includes "the areal extent of contamination in the United States associated with the Upper Columbia River, and all suitable areas in proximity to the contamination necessary for implementation of a response action." UAO at 2.

[4] The NPL "is a compilation of uncontrolled hazardous substances releases in the United States that are 'priorities' for long-term evaluation and response." 4 William H. Rodgers, Jr., *Environmental Law: Hazardous Wastes and Substances* § 8.7(C) (Supp. 2005). "Inclusion of a site or facility on the list requires no action, assigns no liability, and does not pass judgment on the owner or operator. . . . [T]he key consequence of being listed is that only NPL sites qualify for [Superfund]-financed remedial action." *Id.*

[5] This is not the first time the Trail Smelter has been in a dispute over transboundary environmental pollution. *See generally* Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail for CERCLA*, 14 N.Y.U. Envtl. L.J. 233, 241–53 (2006) (describing factual and procedural background of the Trail Smelter Arbitration, which concerned sulfur dioxide emissions from the Trail Smelter that migrated into the United States in the early twentieth century).

1995, Teck generated and disposed of hazardous materials, in both liquid and solid form, into the Columbia River. These wastes, known as "slag," include the heavy metals arsenic, cadmium, copper, mercury, lead, and zinc, as well as other unspecified hazardous materials. Before mid–1995, the Trail Smelter discharged up to 145,000 tons of slag annually into the Columbia River. Although the discharge took place within Canada, the EPA concluded that Teck

> has arranged for the disposal of its hazardous substances from the Trail Smelter into the Upper Columbia River by directly discharging up to 145,000 tonnes of slag annually prior to mid–1995. Effluent, such as slag, was discharged into the Columbia River through several outfalls at the Trail Smelter. . . . The slag was carried downstream in the passing river current and settled in slower flowing quiescent areas.[6]

Id. at 3. A significant amount of slag has accumulated and adversely affects the surface water, ground water, sediments, and biological resources of the Upper Columbia River and Lake Roosevelt. Technical evidence shows that the Trail Smelter is the predominant source of contamination at the Site. The physical and chemical decay of slag is an ongoing process that releases arsenic, cadmium, copper, zinc, and lead

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[6] The complaint alleges that the Trail Smelter discharged up to 145,000 tons of slag annually, but the EPA alleges that the Trail Smelter discharged up to 145,000 tonnes annually. A "ton" is equivalent to 2,000 pounds. A "tonne," or metric ton, is equivalent to 1,000 kilograms, or 2,205 pounds. Thus, 145,000 tonnes, each with 205 pounds more than an American "ton," is equivalent to about 160,000 tons. Either way, the Trail Smelter discharged a ton of slag in the colloquial sense, and the difference between the two figures is immaterial for our purposes. Because we take the facts as alleged by Pakootas, we use his figure of 145,000 tons.

into the environment, causing harm to human health and the environment.

After the EPA determined that the Site was eligible for listing on the NPL, it evaluated proposing the Site for placement on the NPL for the purpose of obtaining federal funding for evaluation and future cleanup. At that time Teck Cominco American, Inc. (TCAI)[7] approached the EPA and expressed a willingness to perform an independent, limited human health study if the EPA would delay proposing the Site for NPL listing. The EPA and TCAI entered into negotiations, which reached a stalemate when the parties could not agree on the scope and extent of the investigation that TCAI would perform. The EPA concluded that TCAI's proposed study would not provide the information necessary for the EPA to select an appropriate remedy for the contamination, and as a result the EPA issued the Order on December 11, 2003. The Order directed Teck to conduct a RI/FS[8] under CERCLA for the Site. To date Teck has not complied with the Order, and the EPA has not sought to enforce the Order.

Pakootas filed this action in federal district court under the citizen suit provision of CERCLA. § 9659(a)(1). Pakootas sought a declaration that Teck has violated the Order, injunctive relief enforcing the Order against Teck, as well as penalties for non-compliance and recovery of costs and fees. Teck moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) for failure to

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[7] TCAI is a wholly-owned American subsidiary of Teck.

[8] "The purpose of the remedial investigation/feasibility study (RI/FS) is to assess site conditions and evaluate alternatives to the extent necessary to select a remedy. Developing and conducting an RI/FS generally includes the following activities: project scoping, data collection, risk assessment, treatability studies, and analysis of alternatives. The scope and timing of these activities should be tailored to the nature and complexity of the problem and the response alternatives being considered." 40 C.F.R. § 300.430(a)(2).

state a cause of action under CERCLA and lack of subject matter jurisdiction, on the ground that the district court could not enforce the Order because it was based on activities carried out by Teck in Canada. Teck also moved to dismiss for lack of personal jurisdiction over Teck, a Canadian corporation with no presence in the United States. After Teck filed its motion to dismiss, the State of Washington moved to intervene as of right as a plaintiff in the action. The district court granted the motion to intervene, and considered Teck's pending motion to dismiss to apply to both Pakootas's complaint and the State of Washington's complaint-in-intervention.

The district court denied Teck's motion to dismiss. It held that because the case arises under CERCLA "there is a federal question which confers subject matter jurisdiction on this court." Because there was a federal question, and because Pakootas's claims were not insubstantial or frivolous, the district court held that dismissal under Federal Rule of Civil Procedure 12(b)(1) was inappropriate. The district court also held that "[t]he facts alleged in plaintiffs' complaints establish this court's specific, limited personal jurisdiction over the defendant."

Much of district court's order was devoted to analyzing Teck's argument that the suit involved an impermissible extraterritorial application of CERCLA, and thus whether dismissal for failure to state a claim under CERCLA was appropriate. The district court first acknowledged that "there is some question whether this case really involves an extraterritorial application of CERCLA." However, the district court assumed that the case involved an extraterritorial application of CERCLA, and considered whether extraterritorial application was permissible here.

In addressing the question of extraterritorial application, the district court acknowledged that "Congress has the authority to enforce its laws beyond the territorial boundaries of

the United States," but that it is "a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " (quoting *EEOC v. Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991)). However, the district court concluded that the presumption against extraterritoriality was overcome here, because

> there is no doubt that CERCLA affirmatively expresses a clear intent by Congress to remedy 'domestic conditions' within the territorial jurisdiction of the U.S. That clear intent, combined with the well-established principle that the presumption [against extraterritoriality] is not applied where failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States, leads this court to conclude that extraterritorial application of CERCLA is appropriate in this case.

Further, the district court held that Teck was a "person" under the meaning of § 9601(21), and held that Teck's liability as a "generator" of hazardous waste and/or as an "arranger" of the disposal of hazardous waste could not be ruled out under § 9607(a)(3).[9]

The district court *sua sponte* certified its order for immediate appeal to us pursuant to 28 U.S.C. § 1292(b). There-

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[9] CERCLA defines an arranger as:

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.

§ 9607(a)(3).

after, Teck petitioned for permission to appeal, which we granted. While Teck's petition for permission to appeal was pending before us, the district court granted Teck's motion to stay further proceedings in the district court pending the outcome of this interlocutory appeal.[10]

On this appeal, Teck does not challenge the district court's determination that it had personal jurisdiction over Teck. And although Teck "disputes the conclusion" that the district court had subject matter jurisdiction to hear the case, it does not argue in its briefing that the district court was without subject matter jurisdiction. Rather, Teck argues that the district court should have dismissed Pakootas's complaint

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[10] After this appeal was submitted for decision, Teck filed a request for us to take judicial notice of a settlement agreement between Teck and EPA, in which the EPA agreed to withdraw the Order that is the subject of this appeal. Neither Pakootas nor the State of Washington, who are the plaintiff and plaintiff-intervenor in this litigation, was a party to the settlement agreement. We take notice that the settlement between Teck and the EPA was reached, but we do not take notice of supplemental arguments urged by Teck relating to the agreement.

The parties are agreed that the settlement between Teck and the EPA does not render this action moot. Teck argues that this settlement renders moot Pakootas's claims for injunctive relief to enforce the Order and for declaratory relief that Teck is in violation of the Order, but that Pakootas's claims for civil penalties "for each day" that Teck violated the Order and for attorneys' fees, are not moot. Pakootas disputes that the settlement is self-executing and that it necessarily renders moot the claims for injunctive and declaratory relief. For purposes of this appeal, it is sufficient for us to note that Pakootas's claims for civil penalties and for attorneys' fees are not moot, and that we must proceed to decision of the appeal. On remand, we leave for the district court to decide in the first instance whether the claims for injunctive and declaratory relief are moot.

We further deny Teck's request for us to take judicial notice on this appeal of the following documents: (1) Order Granting Motions to Lift Stay, issued by the district court on October 25, 2005; (2) Plaintiffs' Amended Complaint, filed November 7, 2005; and (3) State of Washington's First Amended Complaint in Intervention, filed November 4, 2005.

under Federal Rule of Civil Procedure 12(b)(6) for two reasons. First, Teck argues that to apply CERCLA to Teck's activities in Canada would be an impermissible extraterritorial application of United States law. Second, Teck argues that it is not liable as a person who "arranged for disposal" of hazardous substances under § 9607(a)(3).

II

We review de novo a district court's decision on a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Decker v. Advantage Fund Ltd.*, 362 F.3d 593, 595–96 (9th Cir. 2004). We review questions of law de novo. *Torres–Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997).

III

We begin by considering how this litigation fits within the CERCLA statutory framework. CERCLA sets forth a comprehensive scheme for the cleanup of hazardous waste sites, and imposes liability for cleanup costs on the parties responsible for the release or potential release of hazardous substances into the environment. *See Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir. 1997); *see also Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990) (stating that "two … main purposes of CERCLA" are "prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party") (cited with approval in *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996)).

To ensure the prompt cleanup of hazardous waste sites, CERCLA gives four options to the EPA:[11] (1) the EPA can investigate and remediate hazardous waste sites itself under §

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[11] CERCLA vests this authority in the President, who in turn has delegated most of his functions and responsibilities to the EPA. *See* 40 C.F.R. § 300.100.

9604, and later seek to recover response costs from the potentially responsible parties (PRPs) under § 9607; (2) the EPA can initiate settlement negotiations with PRPs under § 9622; (3) the EPA can file suit in federal district court to compel the PRPs to abate the threat if there is an "imminent and substantial" threat to public health or welfare under § 9606(a); or (4) the EPA can issue orders directing the PRPs to clean up the site under § 9606(a). In this case, the EPA chose the fourth approach, and issued the Order to Teck under § 9606(a).

If a party receives an order and refuses to comply, enforcement options are available. *See generally Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 387 (8th Cir. 1987). First, the EPA may bring an action in federal district court to compel compliance, using the contempt powers of the district court as a potential sanction for non-compliance. § 9606(a). Second, the EPA may bring an action in federal district court seeking to impose fines of up to $25,000 for each day that the party fails to comply with the order. § 9606(b)(1). Third, the EPA may initiate cleanup of the facility itself under § 9604, and the party responsible for the pollution is potentially liable for the response and cleanup costs, plus treble damages. § 9607(c)(3).

Here, the EPA has not sought to enforce the Order through any of the mechanisms described above.[12] Rather, Pakootas initiated this suit in federal district court under § 9659, the citizen suit provision of CERCLA. Section 9659(a)(1) provides a cause of action for any person to commence a civil action "against any person . . . who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter." Section 9659(c) gives the district court the

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[12] So far as we can tell from the record, the EPA did not take any formal action against Teck between issuing the Order on December 11, 2003 and settling with Teck on June 2, 2006.

power "to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation." Further, § 9613(h)(2), the "timing of review" provision of CERCLA, grants federal courts jurisdiction to review an order issued under § 9606(a) when a party seeks to enforce the order.

Having placed this litigation in context, we turn to the merits.

IV

Teck's primary argument is that, in absence of a clear statement by Congress that it intended CERCLA to apply extraterritorially, the presumption against extraterritorial application of United States law precludes CERCLA from applying to Teck in Canada. We need to address whether the presumption against extraterritoriality applies only if this case involves an extraterritorial application of CERCLA. So a threshold question is whether this case involves a domestic or extraterritorial application of CERCLA.

Unlike other environmental laws such as the Clean Air Act, 42 U.S.C. §§ 7401–7671q, Clean Water Act, 33 U.S.C. §§ 1251–1387, and Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k, CERCLA is not a regulatory statute. Rather, CERCLA imposes liability for the cleanup of sites where there is a release or threatened release of hazardous substances into the environment. *See Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 881 (9th Cir. 2001) (en banc) ("CERCLA holds a PRP liable for a disposal that 'releases or threatens to release' hazardous substances into the environment."). CERCLA liability attaches when three conditions are satisfied: (1) the site at which there is an actual or threatened release of hazardous substances is a "facility" under § 9601(9); (2) a "release" or "threatened release" of a hazardous substance from the facility has oc-

curred, § 9607(a)(4); and (3) the party is within one of the four classes of persons subject to liability under § 9607(a).[13]

CERCLA defines the term "facility" as, in relevant part, "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." § 9601(9). The Order defines the "facility" in this case as the Site, which is described as the "extent of contamination *in the United States* associated with the Upper Columbia River." UAO at 2 (emphasis added); *see also* UAO at 5 ("The Upper Columbia River Site is a 'facility' as defined in Section 101(9) of CERCLA, 42 U.S.C.

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[13] There is a question whether the elements of CERCLA liability outlined in § 9607(a) are the same elements that the EPA must allege when issuing an order under § 9606(a). That is, § 9606(a) authorizes the EPA to issue "such orders as may be necessary to protect public health and welfare and the environment," but does not specify exactly what the EPA must allege before issuing such orders. Section 9606(b)(1) states that the EPA can seek fines for non-compliance in federal district court unless the person who refuses to comply with the order has "sufficient cause."

The Eighth Circuit, the only federal court of appeals to address the issue, has held that "sufficient cause" includes a defense that "the applicable provisions of CERCLA, EPA regulations and policy statements, and any formal or informal hearings or guidance the EPA may provide, give rise to an objectively reasonable belief in the invalidity or inapplicability of the clean-up order." *Solid State Circuits*, 812 F.2d at 392. We need not here decide whether a party that is not liable under § 9607(a) necessarily has "sufficient cause" to refuse to comply with an order issued under § 9606(a) because, as we hold below, Teck is potentially liable under § 9607(a).

However, one element of § 9607(a) liability does not apply here. In private cost recovery actions under § 9607(a), the claimant must incur response costs that are both "necessary" and "consistent with the national contingency plan." § 9607(a)(4). *See Carson Harbor Vill.*, 270 F.3d at 871–72. Because Pakootas filed a citizen suit under § 9659 rather than a private cost recovery action under § 9607(a), the requirement that a private party incur response costs before filing suit does not apply here.

§ 9601(9).").[14] The slag has "come to be located" at the Site, and the Site is thus a facility under § 9601(a). *See 3550 Stevens Creek Assocs. v. Barclays Bank of California*, 915 F.2d 1355, 1360 n.10 (9th Cir. 1990) ("[T]he term facility has been broadly construed by the courts, such that in order to show that an area is a facility, the plaintiff need only show that a hazardous substance under CERCLA is placed there or has otherwise come to be located there." (internal quotation marks omitted)). The Order defines the facility as being entirely within the United States, and Teck does not argue that the Site is not a CERCLA facility. Because the CERCLA facility is within the United States, this case does not involve an extraterritorial application of CERCLA to a facility abroad. The theory of Pakootas's complaint, seeking to enforce the terms of the Order to a "facility" within the United States, does not invoke extraterritorial application of United States law precisely because this case involves a domestic facility.

The second element of liability under CERCLA is that there must be a "release" or "threatened release" of a hazardous substance from the facility into the environment. *See* § 9607(a)(4). To determine if there is an actual or threatened release here, we consider the statutory definition of release. CERCLA defines a "release," with certain exceptions not relevant here, as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." § 9601(22).

Here, several events could potentially be characterized as releases. First, there is the discharge of waste from the Trail Smelter into the Columbia River in Canada. Second,

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[14] Because the EPA and Pakootas in seeking enforcement of the EPA's order do not characterize either the Trail Smelter or the Columbia River in Canada as a facility, we need not and do not reach whether these sites are facilities for purposes of CERCLA.

there is the discharge or escape of the slag from Canada when the Columbia River enters the United States. And third, there is the leaching of heavy metals and other hazardous substances from the slag into the environment at the Site. Although each of these events can be characterized as a release, CERCLA liability does not attach unless the "release" is from a CERCLA facility.

Here, as noted, the Order describes the facility as the Site; not the Trail Smelter in Canada or the Columbia River in Canada. Pakootas has alleged that the leaching of hazardous substances from the slag that is in the Site is a CERCLA release, and Teck has not argued that the slag's interaction with the water and sediment of the Upper Columbia River is not a release within the intendment of CERCLA. Our precedents establish that the passive migration of hazardous substances into the environment from where hazardous substances have come to be located is a release under CERCLA. *See A & W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1111 (9th Cir. 1998) (holding that wind blowing particles of hazardous substances from a pile of waste was a CERCLA release); *United States v. Chapman*, 146 F.3d 1166, 1170 (9th Cir. 1998) (affirming summary judgment where the Government presented evidence that corroding drums were leaking hazardous substances into the soil); *see also Coeur d'Alene Tribe v. Asarco, Inc.*, 280 F.Supp.2d 1094, 1113 (D. Idaho 2003) ("Th[e] passive movement and migration of hazardous substances by mother nature (no human action assisting in the movement) is still a 'release' for purposes of CERCLA in this case."). We hold that the leaching of hazardous substances from the slag at the Site is a CERCLA release. That release—a release into the United States from a facility in the United States—is entirely domestic.

The third element of liability under CERCLA is that the party must be a "covered person" under § 9607(a). Teck argues that it is not a covered person under § 9607(a)(3) be-

cause it has not "arranged for disposal" of a hazardous substance "by any other party or entity" as required by § 9607(a)(3), because Teck disposed of the slag itself, and without the aid of another. Alternatively, Teck argues that if it is an arranger under § 9607(a)(3), then basing CERCLA liability on Teck arranging for disposal of slag in Canada is an impermissible extraterritorial application of CERCLA.

Assuming that Teck is an arranger under § 9607(a)(3),[15] we consider whether the fact that the act of arranging in Canada for disposal of the slag makes this an extraterritorial application of CERCLA. Teck argues that because it arranged in Canada for disposal, that is, the act of arranging took place in Canada even though the hazardous substances came to be located in the United States, it cannot be held liable under CERCLA without applying CERCLA extraterritorially.

The text of § 9607(a)(3) applies to "any person" who arranged for the disposal of hazardous substances. The term "person" includes, *inter alia*, "an individual, firm, corporation, association, partnership, consortium, joint venture, [or] commercial entity." § 9601(21). On its face, this definition includes corporations such as Teck, although the definition does not indicate whether foreign corporations are covered. Teck argues that because the Supreme Court recently held that the term "any court" as used in 18 U.S.C. § 922(g)(1) does not include foreign courts, we should interpret the term "any person" so as not to include foreign corporations. *See Small v. United States*, 544 U.S. 385, 390-91, 125 S.Ct. 1752, 161 L.Ed.2d 651 (2005).

The decision in *Small* was based in part on *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 4 L.Ed. 471 (1818), in which Chief Justice Marshall held for the Court that the words "any person or persons," as used in a statute prohibit-

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15 We address in the next section Teck's contention that it is not a person for § 9607(a) purposes because it has not "arranged for disposal" of hazardous substances "by any other party or entity."

ing piracy on the high seas, "must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them." *Id.* at 631. The Court held that "any person or persons" did not include crimes "committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state." *Id.* at 633–34. However, the Court held that even though the statute did not specifically enumerate foreign parties as "persons," the statute did apply to punish piracy committed by foreign parties against vessels belonging to subjects of the United States. *See id.*

Palmer relied upon two benchmarks for determining whether terms such as "any person" apply to foreign persons: (1) the state must have jurisdiction over the party, and (2) the legislature must intend for the term to apply. *See id.* at 631. Regarding jurisdiction, Teck argued in the district court that there was no personal jurisdiction over it. The district court held that there was personal jurisdiction, and Teck has not appealed that determination. Because a party can waive personal jurisdiction, we are not required to consider it *sua sponte*. *See Smith v. Idaho*, 392 F.3d 350, 355 n.3 (9th Cir. 2004) (citing the "longstanding rule that personal jurisdiction, in the traditional sense, can be waived and need not be addressed *sua sponte*"). Nevertheless, we agree with the district court that there is specific personal jurisdiction over Teck here.[16] Because there is specific personal jurisdiction

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16 We do not decide whether there is general personal jurisdiction over Teck. Rather, we adopt the district court's conclusion that there is specific personal jurisdiction over Teck here, based on Washington State's long-arm statute, which applies to "the commission of a tortious act" within Washington, Wash. Rev. Code § 4.28.185, and our case law holding that "personal jurisdiction can be predicated on (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suf-

over Teck here based on its allegedly tortious act aimed at the state of Washington, the first *Palmer* benchmark is satisfied, and we can appropriately construe the term "any person" to apply to Teck.

The second *Palmer* benchmark is that the legislature must intend for the statute to apply to the situation. Except for the statutory definition of "any person," CERCLA is silent about *who* is covered by the Act. But CERCLA is clear about what is covered by the Act. CERCLA liability attaches upon release or threatened release of a hazardous substance into the environment. CERCLA defines "environment" to include "any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air *within the United States or under the jurisdiction of the United States*." § 9601(8) (emphasis added). CERCLA's purpose is to promote the cleanup of hazardous waste sites where there is a release or threatened release of hazardous substances into the environment within the United States. *See ARC Ecology v. U.S. Dep't of the Air Force*, 411 F.3d 1092, 1096–98 (9th Cir. 2005) (citing legislative history demonstrating that Congress intended CERCLA to apply to cleanup hazardous waste sites in the United States). Because the legislature intended to hold parties responsible for hazardous waste sites that release or threaten release of hazard-

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fered—in the forum state." *See Core–Vent Corp. v. Nobel Inds. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993).

AT & T v. Compagnie Bruxelles Lambert, 94 F.3d 586 (9th Cir. 1996), is not to the contrary. There, AT & T claimed that Compagnie Bruxelles Lambert was liable under CERCLA because its subsidiary operated a site from which hazardous substances were released. *Id.* at 590–91. We held that there was no specific jurisdiction over the parent company because (1) the parent company had insufficient independent contacts with the United States to establish personal jurisdiction, and (2) the subsidiary was not acting as the parent company's alter ego. *Id.* Here, Teck has sufficient *independent* personal contacts with the forum state to justify specific personal jurisdiction.

ous substances into the United States environment, the second *Palmer* benchmark is satisfied here.

Although the *Palmer* analysis supports the proposition that CERCLA applies to Teck, *Palmer* of course does not address the distinction between domestic or extraterritorial application of CERCLA. The *Palmer* analysis, however, in what we have termed its second benchmark, brings to mind the "domestic effects" exception to the presumption against extraterritorial application of United States law. *See Steele v. Bulova Watch Co.*, 344 U.S. 280, 287–88, 73 S.Ct. 252, 97 L.Ed. 319 (1952) (finding jurisdiction in a trademark suit against a person in Mexico who manufactured counterfeit Bulova watches that then entered and caused harm within the United States). The difference between a domestic application of United States law and a presumptively impermissible extraterritorial application of United States law becomes apparent when we consider the conduct that the law prohibits. In *Steele* the prohibited conduct, the unauthorized use and reproduction of Bulova's registered trademark, took place in Mexico but the harm, the dilution of Bulova's trademark, took place in the United States. *Id.* at 287, 73 S.Ct. 252. The Court therefore held that there was jurisdiction in that case.

Here, the operative event creating a liability under CERCLA is the release or threatened release of a hazardous substance. *See* § 9607(a)(4). Arranging for disposal of such substances, in and of itself, does not trigger CERCLA liability, nor does actual disposal of hazardous substances.[17] A

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[17] The terms "disposal" and "release" are each defined in CERCLA. "Disposal" is defined by reference to RCRA § 6903(3), which defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." CERCLA defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the envi-

release must occur or be threatened before CERCLA is triggered. A party that "arranged for disposal" of a hazardous substance under § 9607(a)(3) does not become liable under CERCLA until there is an actual or threatened release of that substance into the environment. Arranging for disposal of hazardous substances, in itself, is neither regulated under nor prohibited by CERCLA. Further, disposal activities that were legal when conducted can nevertheless give rise to liability under § 9607(a)(3) if there is an actual or threatened release of such hazardous substances into the environment. *See Cadillac Fairview/California, Inc. v. United States* (*Cadillac Fairview/California I*), 41 F.3d 562, 565–66 (9th Cir. 1994) (holding that a party that sold a product to another party "arranged for disposal" of a hazardous substance); *Cadillac Fairview/California, Inc. v. Dow Chem. Co.* (*Cadillac Fairview/California II*), 299 F.3d 1019, 1029 (9th Cir. 2002) (characterizing the conduct at issue in *Cadillac Fairview/California I* as "legal at the time").

The location where a party arranged for disposal or disposed of hazardous substances is not controlling for purposes of assessing whether CERCLA is being applied extraterritorially, because CERCLA imposes liability for releases or threatened releases of hazardous substances, and not merely for disposal or arranging for disposal of such substances.[18]

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ronment . . . ." § 9601(22). "[F]rom these definitions, we can conclude that 'release' is broader than 'disposal,' because the definition of 'release' includes 'disposing' (also, it includes 'passive' terms such as 'leaching' and 'escaping,' which are not included in the definition of 'disposal')." *Carson Harbor Vill.*, 270 F.3d at 878.

[18] CERCLA is a strict liability statute, and liability can attach even when the generator has no idea how its waste came to be located at the facility from which there was a release. *See O'Neil v. Picillo*, 883 F.2d 176, 183 & n.9 (1st Cir. 1989). The three statutory defenses enumerated in § 9607(b), including defenses for "an act of God," "an act of war," or "an act or omission of a third party other than an employee or agent of the defendant," are "the only [defenses] available, and . . . the traditional eq-

Because the actual or threatened release of hazardous substances triggers CERCLA liability, and because the actual or threatened release here, the leaching of hazardous substances from slag that settled at the Site, took place in the United States, this case involves a domestic application of CERCLA.

Our conclusion is reinforced by considering CERCLA's place within the constellation of our country's environmental laws, and contrasting it with RCRA:

> Unlike [CERCLA], RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards. RCRA's primary purpose, rather, is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, "so as to minimize the present and future threat to human health and the environment."

Meghrig, 516 U.S. at 483, 116 S.Ct. 1251 (quoting § 9602(b)) (internal citation omitted). RCRA regulates the generation and disposal of hazardous waste, whereas CERCLA imposes liability to clean up a site when there are actual or threatened releases of hazardous substances into the envi-

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uitable defenses are not." *California ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661, 672 (9th Cir. 2004). There is no requirement that the generator of hazardous substances intend that the waste come to be located at a CERCLA facility. "In the case of an actual release, the plaintiff need only prove that the defendant's hazardous materials were deposited at the site, that there was a release at the site, and that the release caused it to incur response costs." *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 287 F.Supp.2d 1118, 1186 (C.D. Cal. 2003) *aff'd sub nom. Carson Harbor Vill., Ltd. v. County of Los Angeles*, 433 F.3d 1260 (9th Cir. 2006).

ronment. It is RCRA, not CERCLA, that governs prospectively how generators of hazardous substances should dispose of those substances, and it is the Canadian equivalent of RCRA, not CERCLA, that regulates how Teck disposes of its waste within Canada.

Here, the district court assumed, but did not decide, that this suit involved extraterritorial application of CERCLA because "[t]o find there is not an extraterritorial application of CERCLA in this case would require reliance on a legal fiction that the 'releases' of hazardous substances into the Upper Columbia River Site and Lake Roosevelt are wholly separable from the discharge of those substances into the Columbia River at the Trail Smelter." However, what the district court dismissed as a "legal fiction" is the foundation of the distinction between RCRA and CERCLA. If the Trail Smelter were in the United States, the discharge of slag from the smelter into the Columbia River would potentially be regulated by RCRA and the Clean Water Act. And that prospective regulation, if any, would be legally distinct from a finding of CERCLA liability for cleanup of actual or threatened releases of the hazardous substances into the environment from the disposal site, here the Upper Columbia River Site. That the Trail Smelter is located in Canada does not change this analysis, as the district court recognized.

CERCLA is only concerned with imposing liability for cleanup of hazardous waste disposal sites where there has been an actual or threatened release of hazardous substances into the environment. CERCLA does not obligate parties (either foreign or domestic) liable for cleanup costs to cease the disposal activities such as those that made them liable for cleanup costs; regulating disposal activities is in the domain of RCRA or other regulatory statutes.

We hold that applying CERCLA here to the release of hazardous substances at the Site is a domestic, rather than an extraterritorial application of CERCLA, even though the

original source of the hazardous substances is located in a foreign country.

V

We next address Teck's only other argument—that it is not covered by § 9607(a)(3) because it has not "arranged for disposal . . . of hazardous substances . . . by any other party or entity" because, if the facts in the complaint are taken as true, Teck disposed of the slag itself. Preliminarily, we note that neither Pakootas, nor the Order, specifically allege that Teck is an arranger under § 9607(a)(3). Rather, the Order states that Teck is a "responsible party under Sections 104, 107, and 122 of CERCLA, 42 U.S.C. §§ 9604, 9607, and 9622." UAO at 6. The parties have, however, focused in their arguments solely on § 9607(a)(3).[19]

Section 9607(a)(3) holds liable parties that arranged for the disposal of hazardous substances. It states, in relevant part, the following:

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for the transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such substances . . . shall be liable for . . .

certain costs of cleanup. § 9607(a)(3). We have previously said that "neither a logician nor a grammarian will find comfort in the world of CERCLA," *Carson Harbor Vill.*, 270 F.3d at 883, a statement that applies with force to § 9607(a)(3). Section 9607(a)(3) does not make literal or

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[19] The parties have not briefed or argued whether Teck may be liable under § 9607(a)(1), (2), or (4). We accordingly express no opinion on whether Teck may be liable under these subsections.

grammatical sense as written. It is by no means clear to what the phrase "by any other party or entity" refers. Pakootas argues that it refers to a party who owns the waste; and Teck argues that it refers to a party who arranges for disposal with the owner. To make sense of the sentence we might read the word "or" into the section, which supports Pakootas's position, or we might delete two commas, which supports Teck's position. Neither construction is entirely felicitous.

Section 9607(a)(3)'s phrase "by any other party or entity" can be read to refer to "hazardous substances owned or possessed by such person," such that parties can be liable if they arranged for disposal of their own waste or if they arranged for disposal of wastes owned "by any other party or entity." This would mean that a party need not own the waste to be liable as an arranger. But it would require reading the word "or" into the provision, so that the relevant language would read "any person who . . . arranged for disposal or treatment . . . of hazardous substances **owned** or possessed **by such person [or] by any other party or entity . . . .**" We followed this approach in *Cadillac Fairview/California I*, where we said with forcible reasoning:

> Liability is not limited to those who own the hazardous substances, who actually dispose of or treat such substances, or who control the disposal or treatment process. The language explicitly extends liability to persons "otherwise arrang[ing]" for disposal or treatment of hazardous substances whether owned by the arranger or "by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity."

41 F.3d at 565 (quoting § 9607(a)(3)) (alteration in original); *see also Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 659 (6th Cir. 2000) (holding that defendant was potentially liable as an arranger when it discharged hazardous substances into a river).

The text of § 9607(a)(3) can also be modified to support a different meaning, the one that Teck advances on this appeal. Teck argues that the phrase "by any other party or entity" refers to "or otherwise arranged for disposal or treatment," and so, the argument runs, arranger liability does not attach unless one party arranged with another party to dispose of hazardous substances. If we accept this position, then a generator of hazardous substances who disposes of the waste alone and with no other participant may defeat CERCLA liability, because the generator had not "arranged" with a second party for disposal of the waste. But this interpretation would appear to require the removal of the two commas that offset the phrase "by any other party or entity," so that the relevant language would read "any person who . . . **arranged for disposal** or treatment . . . of hazardous substances owned or possessed by such person[ ] **by any other party or entity**[ ]." In *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, 976 F.2d 1338 (9th Cir. 1992) we perhaps implicitly, albeit summarily, suggested that this reading might be appropriate, stating: "Nor has [Plaintiff] alleged that [Defendant] Ferry arranged for the contaminated soil to be disposed of 'by any other party or entity' under 9607(a)(3). Ferry disposed of the soil itself by spreading it over the uncontaminated areas of the property." *Id.* at 1341; *see also Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 24 (1st Cir. 2004) ("The clause 'by any other party or entity' clarifies that, for arranger liability to attach, the disposal or treatment must be performed by another party or entity, as was the case here."). Thus it can be argued that an implication from *Kaiser Aluminum* supports Teck's view.

Teck's argument relying on implication from *Kaiser Aluminum* would create a gap in the CERCLA liability regime by allowing a generator of hazardous substances potentially to avoid liability by disposing of wastes without involving a transporter as an intermediary. If the generator disposed of the waste on the property of another, one could ar-

gue that the generator would not be liable under § 9607(a)(1) or (a)(2) because both subsections apply to the owner of a facility; as we described above the relevant facility is the site at which hazardous substances are released into the environment, not necessarily where the waste generation and dumping took place. Liability as a transporter under § 9607(a)(4) might not attach because transporter liability applies to "any person who accepts or accepted any hazardous substance for transport." Although we do not here decide the contours of transporter liability, one could argue that a generator who owns hazardous substances cannot "accept" such hazardous substances for transport because they are already held by the generator. We hesitate to endorse a statutory interpretation that would leave a gaping and illogical hole in the statute's coverage, permitting argument that generators of hazardous waste might freely dispose of it themselves and stay outside the statute's cleanup liability provisions. We think that was not what was intended by Congress's chosen language and statutory scheme.

The ambiguous phrase "by any other party or entity" cannot sensibly be read to refer both to the language urged by Pakootas and to that urged by Teck in their differing theories of statutory interpretation. In interpreting the turbid phrase and punctuation on which the parties have vigorously pressed contradictory theories, we necessarily navigate a quagmire. Yet, in the face of statutory ambiguity, § 9607(a)(3) "must be given 'a liberal judicial interpretation . . . consistent with CERCLA's overwhelmingly remedial statutory scheme.'" *Cadillac Fairview/California I*, 41 F.3d at 565 n.4 (quoting *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989) (alteration in original)).

Pakootas and the State of Washington suggest that we can resolve the inconsistent and mutually-exclusive language in *Cadillac Fairview/California I* and *Kaiser Aluminum* by dismissing as ambiguous or as dicta the statement in *Kaiser Aluminum* that "[n]or has [Plaintiff] alleged that Ferry ar-

ranged for the contaminated soil to be disposed of 'by any other party or entity' under 9607(a)(3)." 976 F.2d at 1341. The argument is that it is unclear whether we meant in *Kaiser Aluminum* that we did not need to reach the question because Plaintiff had not alleged that Ferry was an arranger, or instead that Plaintiff had alleged that Ferry was an arranger but that we rejected that interpretation.

We conclude that Pakootas and the State of Washington are correct. The two sentences from *Kaiser Aluminum* quoted above are the only two sentences in that opinion to discuss arranger liability. The opinion contains no analysis of the text of § 9607(a)(3), and does not discuss arguments for or against interpreting § 9607(a)(3) to require the involvement of another party or entity for arranger liability to attach. The ambiguous discussion of § 9607(a)(3) liability was not in our view a holding, but rather a prelude to discussing why the defendant in *Kaiser Aluminum* was potentially liable as an owner of a facility under § 9607(a)(2) or as a transporter under § 9607(a)(4). And perhaps most importantly, the statement in question may be simply a description of what was not alleged by a party, rather than our court's choice of a rule of law.

Further, the statement in *Kaiser Aluminum* bears the hallmarks of dicta. *See United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001) (en banc) (Kozinski, J., concurring) ("Where it is clear that a statement is made casually and without analysis, where the statement is uttered in passing without due consideration of the alternatives, or where it is merely a prelude to another legal issue that commands the panel's full attention, it may be appropriate to re-visit the issue in a later case.").[20]

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[20] Moreover, a characterization of the statement in *Kaiser Aluminum* as a dictum, or as merely reflecting the absence of an allegation by the plaintiff, is consistent with our preexisting circuit authority, not addressed in *Kaiser Aluminum*, which had suggested that a generator could be liable under § 9607(a)(3) even if a second party was not involved. *See Ascon*

Because we view the statement in *Kaiser Aluminum* as offhand, unreasoned, and ambiguous, rather than as an intended choice of a rule, we consider the Ninth Circuit's law to be represented by *Cadillac Fairview/California I*. And under *Cadillac Fairview/California I*, the phrase "by any other party or entity" refers to ownership of the waste, such that one may be liable under § 9607(a)(3) if they arrange for disposal of their own waste or someone else's waste, and that the arranger element can be met when disposal is not arranged "by any other party or entity." We hold instead that Teck is potentially liable under § 9607(a)(3), and we reject Teck's argument that it is not liable under § 9607(a)(3) because it did not arrange for disposal of its slag with "any other party or entity."

VI

In conclusion, we hold that the district court correctly denied Teck's motion to dismiss Pakootas's complaint for failure to state a claim, and reject Teck's arguments to the contrary. Applying CERCLA to the Site, as defined by the Order issued by the EPA, is a domestic application of CERCLA. The argument that this case presents an extraterritorial application of CERCLA fails because CERCLA liability does not attach until there is an actual or threatened release of hazardous substances into the environment; the suit concerns actual or threatened releases of heavy metals and other hazardous substances into the Upper Columbia River Site within the United States. We reject Teck's argument that it is not liable under § 9607(a)(3) because it did not arrange for disposal of hazardous substances "by any other party or entity."

AFFIRMED.

[Footnote continued from previous page]
Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1156 (9th Cir. 1989) (reversing the district court's dismissal of Ascon's complaint for failure to state a claim because Ascon alleged that "the eleven oil company defendants and four transporter defendants deposited hazardous waste onto the property").

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation and DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation,	)	No. CV-04-256-AAM
Plaintiffs,	)	**ORDER DENYING MOTION TO DISMISS**
vs.	)	
TECK COMINCO METALS, LTD., a Canadian corporation, Defendant.	)	

BEFORE THE COURT is the defendant's Motion To Dismiss (Ct. Rec. 6). The motion was heard with oral argument on November 4, 2004. Paul J. Dayton, Esq., argued on behalf of plaintiffs Pakootas and Michel. Steven J. Thiele, Esq., argued on behalf of intervenor-plaintiff, State of Washington. Gerald F. George, Esq., and Thomas A. Campbell, Esq., argued on behalf of defendant.

I. BACKGROUND

Plaintiffs Joseph A. Pakootas and Donald R. Michel are enrolled members of the Confederated Tribes of the Colville Reservation who, under the "citizen suit" provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. Section 9601 et seq., have commenced this action to enforce the Unilateral Administrative Order for Remedial Investigation/Feasibility Study (UAO) issued to defendant Teck Cominco Metals, Ltd., (TCM), on December 11, 2003 by the United States Environmental Protection Agency (EPA). The State of Washington is also a plaintiff, having intervened in the litigation as a matter of right under CERCLA.

The defendant TCM is a Canadian corporation which owns and operates a smelter in Trail, British Columbia, located approximately 10 Columbia River miles north of the United States-Canada border. The UAO directs TCM to conduct a Remedial Investigation/Feasibility Study (RI/FS) to investigate and determine the full nature of contamination at the "Upper Columbia River Site" due to materials disposed of into the Columbia River from defendant's smelter. The "Upper Columbia River Site" includes "all areas within the United States where hazardous substances from [defendant's] operations have migrated or materials containing hazardous substances have come to be placed." (UAO at p. 7, Ex. A to Defendant's Memorandum).

Defendant moves to dismiss this action, contending the court does not have subject matter jurisdiction (Fed. R. Civ. P. 12(b)(1)), does not have personal jurisdiction (Fed. R. Civ. P. 12(b)(2)), and that plaintiffs' complaints fail to state claims upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)). Specifically, defendant contends the provisions of CERCLA cannot be applied to a Canadian corporation for actions taken by that corporation which occur within Canada.

II. DISCUSSION

A. Subject Matter Jurisdiction

This case arises under CERCLA and therefore, there is a federal question which confers subject matter jurisdiction on this court. See 42 U.S.C. § 9613(b) and § 9659(c).

A claim that a right exists under federal law is enough for jurisdiction unless the claim is insubstantial or frivolous. A substantial claim that a remedy may be implied from a federal statute is enough for jurisdiction. If it is held that federal law does not provide for the remedy, the dismissal should be on the merits rather than for want of jurisdiction. *ARC Ecology*, 294 F.Supp.2d 1152, 1156 (N.D. Cal. 2003). Whether the complaint states a cause of action upon which relief could be granted is a question of law and just like issues of fact, it must be decided after and not before the court has assumed jurisdiction over the controversy. *Id.* In *ARC Ecology*, the district court found it had subject matter jurisdiction to adjudicate the novel claim that CERCLA applies extraterritorially. *Id.*

Plaintiffs' CERCLA claims are not insubstantial or frivolous. This court has subject matter jurisdiction to determine whether plaintiffs' claims seek to apply CERCLA extraterritorially and if so, whether that is permissible under CERCLA. That determination is made *infra* under Fed. R. Civ. P. 12(b)(6).

B. Personal Jurisdiction

Absent one of the traditional bases for personal jurisdiction- presence, domicile, or consent- due process requires a defendant have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154 (1945). The forum state must have a sufficient relationship with the defendants and the litigation to make it reason-

able to require them to defend the action in a federal court located in that state. The purpose of the "minimum contacts" requirement is to protect a defendant against the burdens of litigating at a distant or inconvenient forum and insure that states do not reach out beyond the limits of their sovereignty imposed by their status in a federal system. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S.Ct. 559 (1980).

The extent to which a federal court can exercise personal jurisdiction, absent the traditional bases of consent, domicile or physical presence, depends on the nature and quality of defendant's "contacts" with the forum state. If defendant's activities in the forum state are "substantial, continuous and systematic," a federal court can, if permitted by the state's long-arm statute, exercise jurisdiction as to any cause of action, even if unrelated to defendant's activities within the state. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445, 72 S.Ct. 413 (1952).

Even if a non-resident defendant's "contacts" with the forum state are not sufficiently "continuous and systematic" for general jurisdiction, the defendant may still be subject to jurisdiction on claims related to its activities there. This "limited" or "specific" personal jurisdiction requires a showing that: (1) the out-of-state defendant purposefully directed its activities toward residents of the forum state or otherwise established contacts with the forum state; (2) plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) the forum's exercise of personal jurisdiction in the particular case must be reasonable in that it must comport with "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-76, 105 S.Ct. 2174 (1985). The defendant must have purposefully directed its activities at forum residents, or purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of local law. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct.

1228 (1958). This protects against a nonresident defendant being haled into local courts solely as the result of "random, fortuitous or attenuated" contacts. *Burger King*, 471 U.S. at 475. "[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297.

Washington's long-arm statute, found at RCW 4.28.185, provides[1]:

> (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person . . . to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any said acts:
>
> (b) The commission of a tortious act within this state;
>
> . . .
>
> (3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

If a non-resident, acting entirely outside of the forum state, intentionally causes injuries within the forum state, local jurisdiction is presumptively reasonable. Under such circumstances, the defendant must "reasonably anticipate" being haled into court in the forum state. *Calder v. Jones*, 465 U.S. 783, 790, 104 S.Ct. 1482 (1984). Personal jurisdiction

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[1] A federal district court must look to the law of the forum state in determining whether it may exercise personal jurisdiction over an out-of-state defendant. *MacDonald v. Navistar International Transp. Corp.*, 143 F.Supp.2d 918 (S.D. Ohio 2001).

can be established based on: (1) intentional actions; (2) expressly aimed at the forum state; (3) causing harm, the brunt of which is suffered, and which defendant knows is likely to be suffered in the forum state. *Core-Vent Corp. v. Nobel Inds. AB*, 11 F.3d 1482, 1486 (9th Cir. 1994). The "express aiming" requirement is satisfied when it is alleged the nonresident engaged in "wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000).

The facts alleged in the individual plaintiffs' complaint and the State of Washington's complaint-in-intervention satisfy this three-part test.[2] The complaints allege that from approximately 1906 to mid-1995, defendant generated and disposed of hazardous substances directly into the Columbia River and that these substances were carried downstream into the waters of the United States where they have eventually accumulated and cause continuing impacts to the surface water and ground water, sediments, and biological resources which comprise the Upper Columbia River and Franklin D. Roosevelt Lake. The allegation is that disposing of hazardous substances into the Columbia River is an intentional act expressly aimed at the State Washington in which the Upper Columbia River and Franklin D. Roosevelt Lake are located. This disposal causes harm which defendant knows is likely to

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[2] Although defendant is the moving party on a motion to dismiss for lack of personal jurisdiction, plaintiffs are the ones who invoked the court's jurisdiction and bear the burden of proving the necessary jurisdictional facts. *Flynt Distrib. Co., Inc., v. Harvey*, 734 F.2d 1389, 1392 (9th Cir. 1984). Motions to dismiss under Rule 12(b)(2) may test either the plaintiff's theory of jurisdiction or the facts supporting the theory. In evaluating plaintiffs' jurisdictional theory, the court need only determine whether the facts alleged, if true, are sufficient to establish jurisdiction. No evidentiary hearing or factual determination is necessary. *Credit Lyonnais Securities (USA), Inc. v. Alcantara*, 183 F.3d 151, 153 (2nd Cir. 1999).

be suffered downstream by the State of Washington and those individuals, such as Pakootas and Michel, who fish and recreate in the Upper Columbia River and Lake Roosevelt.

The burden is on the defendant to prove the forum's exercise of jurisdiction would not comport with "fair play and substantial justice." *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851-52 (9th Cir. 1993). If a nonresident has deliberately engaged in significant activities within the forum state, "it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Burger King*, 471 U.S. at 476. Furthermore, if defendant "purposefully had directed his activities at forum residents . . . he must present a compelling case" that the exercise of jurisdiction would in fact be unreasonable. *Id.* at 477.

In determining the "reasonableness" of exercising personal jurisdiction, the following factors must be considered: (1) the extent of defendant's purposeful interjection; (2) the burden on defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution to the controversy; (6) the importance of the forum to plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *Core-Vent*, 11 F.3d at 1487-88. No one factor is dispositive and the court must balance all of the factors. *Id.* at 1488. The "reasonableness" requirement may defeat local jurisdiction even if defendant has purposefully engaged in forum-related activities. *Burger King*, 471 U.S. at 477-78.

The exercise of jurisdiction over defendant TCM does not offend traditional notions of fair play and substantial justice. The burden on defendant in defending in this forum is not great. Trail, B.C. is located approximately 10 miles from the Eastern District of Washington. For reasons discussed below, the court finds the exercise of personal jurisdiction

over defendant does not create any conflicts with Canadian sovereignty. It is obvious the State of Washington has a significant interest in adjudicating this dispute, as evidenced by its intervention as a plaintiff, and venue is proper here under CERCLA (42 U.S.C. § 9613(b) and § 9659(b)(1)).

The facts alleged in plaintiffs' complaints establish this court's specific, limited personal jurisdiction over the defendant.

C. Failure To State A Claim

A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). In reviewing a 12(b)(6) motion, the court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from such allegations. *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457, 460 (9th Cir. 1994); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The sole issue raised by a 12(b)(6) motion is whether the facts pleaded, if established, would support a claim for relief; therefore, no matter how improbable those facts alleged are, they must be accepted as true for purposes of the motion. *Neitzke v. Williams*, 490 U.S. 319, 326-27, 109 S.Ct. 1827 (1989).

Defendant contends the UAO cannot be enforced against a Canadian corporation based on conduct which occurred in Canada. At the outset, there is some question whether this case really involves an extraterritorial application of CERCLA, notwithstanding that defendant is a Canadian corporation and its Trail, B.C. smelter is allegedly the source of hazardous substances which have by means of the Columbia River migrated into the Upper Columbia River and Lake Roosevelt. "CERCLA's legislative history reflects a decidedly domestic focus." *ARC Ecology v. U.S. Dept. of the Air Force*, 294 F.Supp.2d at 1156. CERCLA provides a mecha-

nism for cleaning up hazardous waste sites and imposes the cost of clean-up on those responsible for the contamination. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7, 109 S.Ct. 2273 (1989). "CERCLA . . . addresses the cleanup of hazardous substances released into the environment . . . ." *Westfarm Assoc. Ltd. P'ship v. Int'l Fabricare*, 846 F.Supp. 422, 434 (D.Md. 1993).

The Upper Columbia River Site, including Lake Roosevelt, is entirely within the United States. "The Site will include all areas in the United States where hazardous substances from Respondent's Trail operations have migrated or materials containing hazardous substances have come to be placed." (UAO at pp. 7-8). CERCLA is concerned with the "release" of hazardous substances into the Upper Columbia River Site. According to the UAO at pp. 5-6: "The presence of hazardous substances at the Site or the past, present, or potential migration of hazardous substances currently located at or emanating from the Site, constitute actual and or threatened 'releases.'" Under CERCLA, a "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . . " 42 U.S.C. § 9601(22). CERCLA's definition of "environment" is limited to waters, land, and air under the management authority of the United States, within the United States, or under the jurisdiction of the United States. 42 U.S.C. § 9601(8).

It is of course true, however, that these "releases" in the United States would not exist without the activity at the smelter located in British Columbia, prompting defendant to argue that what plaintiffs effectively seek to do here with CERCLA is regulate the discharge of hazardous substances from the Trail smelter. To find there is not an extraterritorial application of CERCLA in this case would require reliance on a legal fiction that the "releases" of hazardous substances into the Upper Columbia River Site and Lake Roosevelt are wholly separable from the discharge of those substances into

the Columbia River at the Trail smelter. The court is hesitant to do that and therefore, will assume this case involves an extraterritorial application of CERCLA to conduct occurring outside U.S. borders. In doing so, however, the court does not find that said application is an attempt to regulate the discharges at the Trail smelter, but rather simply to deal with the effects thereof in the United States.

Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227 (1991) ("*Aramco*"). It is, however, a longstanding principle of American law "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Id.*, quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575 (1949). This "canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained." *Id.*, quoting *Foley Bros.*, 336 U.S. at 285. "It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.*

In applying this canon of construction, courts look to see whether "language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond **places** over which the United States has sovereignty or has some measure of legislative control." *Id.*, quoting *Foley Bros.*, 336 U.S. at 285 (emphasis added). It is assumed Congress legislates "against the backdrop of the presumption against extraterritoriality." *Id.* Unless the affirmative intention of Congress is clearly expressed, it must be presumed Congress "is primarily concerned with **domestic conditions**." *Id.*, quoting *Foley Bros.*, 336 U.S. at 285 (emphasis added).

In *Aramco*, the Supreme Court held Title VII of the 1964 Civil Rights Act did not apply extraterritorially to regulate

the employment practices of U.S. firms that employ American citizens abroad. 499 U.S. at 259. The discriminatory conduct that allegedly violated Title VII occurred within the jurisdiction of another sovereign (Saudi Arabia), although perpetrated by a U.S. firm. Since the petitioners advanced a construction of Title VII that would have logically resulted in the statute's application to foreign as well as American employers, the Supreme Court held the presumption against extraterritoriality was necessary to avoid the inevitable clash between foreign and domestic employment laws. *Id.* at 255-56.

"Extraterritoriality is essentially, and in common sense, a jurisdictional concept concerning the authority of a nation to adjudicate the rights of particular parties and to establish the norms of conduct applicable to events or persons outside its borders." *Environmental Defense Fund v. Massey*, 986 F.2d 528, 530 (D.C. Cir. 1993). The extraterritoriality principle provides that "[r]ules of the United States statutory law, whether prescribed by federal or state authority, apply only to **conduct occurring within, or having effect within, the territory of the United States**." *Id.*, quoting *Restatement (Second) of Foreign Relations Law of the United States* § 38 (1965), and *Restatement (Third) of Foreign Relations Law of the United States* § 403, Com. (g) (1987). (Emphasis added).

In *Massey*, the D.C. Circuit discussed those situations when the presumption against extraterritorial application of a statute does not apply. According to the court, the Supreme Court's decision in *Aramco* made explicit that the presumption does not apply where there is an "'affirmative intention of the Congress clearly expressed' to extend the scope of the statute to conduct occurring within other sovereign nations." 986 F.2d at 531. Second, "the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." *Id.* The court noted that two prime examples of this exception are the Sherman Anti-Trust Act, 15 U.S.C.

§§ 1-7 (1976), and the Lanham Trade-Mark Act, 15 U.S.C. § 1051 et seq. (1976), which "have both been applied extraterritorially where the failure to extend the statute's reach would have negative economic consequences within the United States." *Id.* The presumption against extraterritoriality also does not apply when the conduct regulated by the government occurs within the United States. *Id.*[3] "By definition, an extraterritorial application of a statute involves the regulation of conduct beyond U.S. borders." *Id.*

In *Massey*, the D.C. Circuit concluded there was no issue of "extraterritoriality" regarding the application of the National Environmental Policy Act (NEPA) to agency actions in Antarctica. The court found that "since NEPA is designed to regulate conduct occurring within the territory of the United States, and imposes no substantive requirements which could be interpreted to govern conduct abroad, the presumption against extraterritoriality" did not apply. 986 F.2d at 533. Antarctica's unique status in the international arena as a "global commons" rather than a sovereign foreign nation supported the circuit's conclusion. The court noted that where the U.S. "has some real measure of legislative control over the region at issue, the presumption against extraterritoriality is much weaker." *Id.* And where there is no potential for conflict between U.S. laws and the laws of other nations, the purpose behind the presumption is eviscerated, and the presumption against extraterritoriality applies with significantly less force. *Id.* According to *Massey*:

> Applying the presumption against extraterritoriality here would result in a federal agency being allowed to undertake actions significantly affecting the human environment in

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[3] These "conduct" and "effects" tests are fundamental principles of foreign relations law. *See Tamari v. Bache & Co.*, 730 F.2d 1103, 1107-08 and n.11 (7th Cir. 1984), citing *Restatement (Second) Foreign Relations Law* §§ 17 and 18 (1965).

> Antarctica, an area over which the United States has substantial interest and authority, without ever being held accountable for its failure to comply with the decisionmaking procedures instituted by Congress– even though such accountability, if it was enforced, would result in no conflict with foreign law or a threat to foreign policy. NSF [National Science Foundation] has provided no support for its proposition that conduct occurring within the United States is rendered exempt from otherwise applicable statutes merely because the effects of its compliance would be felt in the global commons.

Id. at 536-37.

Although defendant TCM takes a dim view of *Massey*, contending much what is says is mere dicta, the Ninth Circuit apparently does not share that view. In *In re Simon*, 153 F.3d 991, 995 (9th Cir. 1998), the Ninth Circuit noted that "[i]f Congressional intent concerning extraterritorial application cannot be divined, then courts will examine additional factors to determine whether the traditional presumption against extraterritorial application should be disregarded in a particular case."[4] First, "the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." *Id.*, quoting *Massey*, 986 F.2d at 531. Furthermore, the presumption against extraterritoriality is not applicable when the

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[4] Intent is analyzed by first examining the language of the act for indications of intent regarding extraterritorial application. In addition to the plain statutory words, intent may be discerned with reference to similarly phrased legislation or the overall statutory scheme. If these inquiries are inconclusive, examination of legislative history is appropriate. Resort to administrative interpretations of the law may be employed if the legislative history is inconclusive. *Simon*, 153 F.3d at 995, citing *Aramco*, 499 U.S. at 248, 250-51, and *Foley Bros.*, 336 U.S. at 286-88.

regulated conduct "is intended to and results in, substantial effects within the United States." *Id.*, quoting *Laker Airways, Ltd., v. Sabena Belgian World Airlines*, 731 F.2d 909, 925 (D.C. Cir. 1984). In *Simon*, the Ninth Circuit found the district court had properly concluded that as to actions against a bankruptcy estate, Congress had clearly intended extraterritorial application of the Bankruptcy Code. *Id.* at 996.

In *Subafilms v. MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994), the Ninth Circuit considered whether a claim for infringement can be brought under the Copyright Act when the assertedly infringing conduct consists solely of the authorization within the territorial boundaries of the United States of acts that occur entirely abroad. The circuit held that such allegations did not state a claim for relief under the copyright laws of the United States.

The plaintiffs in *Subafilms* contended the copyright laws extended to extraterritorial acts of infringement when such acts result in adverse effects within the United States. The circuit disagreed. It noted there was an "undisputed axiom" that the copyright laws of the United States had no application to extraterritorial infringement, that said axiom predated the 1909 Copyright Act, that this principle of territoriality had been consistently reaffirmed, and that there was no clear expression of congressional intent in either the 1976 Copyright Act or other relevant enactments to alter the preexisting extraterritoriality doctrine. *Id.* at 1095-96. Furthermore, in 1976, Congress chose to expand one specific extraterritorial application of the Act by declaring that the unauthorized importation of copyrighted works constitutes infringement even when the copies lawfully were made abroad. Thus, "[h]ad Congress been inclined to overturn the preexisting doctrine that infringing acts that take place wholly outside the United States are not actionable under the Copyright Act, it knew how to do so." *Id.* at 1096. Accordingly, the presumption against extraterritoriality was fortified by the language of the

statute as set against its consistent historical interpretation. *Id.* Obviously, because the case at bar presents a legal issue of first impression, there is not an "undisputed axiom," consistently reaffirmed by the courts, that CERCLA does not apply to extraterritorial conduct.

The *Subafilms* court discussed the fact that the "presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in [adverse] domestic effects." *Id.*, quoting *Massey*, 986 F.2d at 531. The Ninth Circuit observed that "[i]n each of the statutory schemes discussed by the *Massey* court, the ultimate touchstone of extraterritoriality consisted of an ascertainment of congressional intent; courts did not rest solely on the consequences of a failure to give a statutory scheme extraterritorial application." *Id.* And the circuit further observed that even "[m]ore importantly, as the *Massey* court conceded, . . . application of the presumption is particularly appropriate when 'it serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* at 1096-97, quoting *Aramco*, 499 U.S. at 248. In a footnote, however, the circuit also conceded that this was not the sole source of the presumption against extraterritorial application because the presumption "is rooted in a number of considerations, not the least of which is the common-sense notion the Congress generally legislates with **domestic concerns** in mind." *Id.* At 1097, n.13, quoting *Smith v. United States*, 507 U.S. 197, 113 S.Ct. 1178, 1183 n. 5 (1993) (emphasis added).

In *Subafilms*, the circuit found the "international discord" factor decisive in the case of the Copyright Act, fully justifying application of the presumption against extraterritoriality, even assuming *arguendo* that "adverse effects" within the United States "generally" would require a plenary inquiry into Congressional intent. *Id.* at 1097. According to the circuit:

> [B]ecause an extension of the extraterritorial reach of the Copyright Act by the courts would in all likelihood disrupt the international regime for protecting intellectual property that Congress so recently described as essential to furthering the goal of protecting the works of American authors abroad . . . we conclude that the *Aramco* presumption must be applied.

Id. at 1098.

Here, defendant TCM contends the presumption against extraterritorial application is not defeated because CERCLA is "bare of any language affirmatively evidencing any intent to reach foreign sources." There is no dispute that CERCLA, its provisions and its "sparse" legislative history, do not clearly mention the liability of individuals and corporations located in foreign sovereign nations for contamination they cause within the U.S. At the same time, however, there is no doubt that CERCLA affirmatively expresses a clear intent by Congress to remedy "domestic conditions" within the territorial jurisdiction of the U.S. That clear intent, combined with the well-established principle that the presumption is not applied where failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States, leads this court to conclude that extraterritorial application of CERCLA is appropriate in this case.[5]

Under CERCLA, a "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body. 42 U.S.C. § 9601(21). Defendant notes

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[5] This case is distinguishable from the situations in *Aramco* and *Asplundh Tree Expert Company v. National Labor Relations Board*, 365 F.3d 168 (3d Cir. 2004), involving American employees working and physically located in foreign lands (Saudi Arabia and Canada).

that "State" is expressly defined to include the "several States of the United States" and other possessions or territories of the United States, § 9601(27), and that "Indian tribe" is defined as a tribe recognized by the United States, § 9601(36). Plaintiffs, however, are not seeking to enforce the UAO against the Canadian government. They are attempting to enforce it against a "corporation," albeit a Canadian corporation. "Corporation" is defined generically. There is no language which excludes foreign corporations from the definition.[6]

42 U.S.C. § 9607(a) lists the categories of persons who can be liable under CERCLA for response costs and damages. They include: (1) "the owner and operator of a vessel or a facility;" (2) "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;" (3) "any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances;" and (4) "any person who accepts or accepted any hazardous substance for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release which causes the incurrence of response costs, of a hazardous substance."

The "Conclusions Of Law And Determinations" section of the UAO (at p. 5) says the "Upper Columbia River Site is a 'facility' as defined in Section 101(9) of CERCLA, 42 U.S.C. § 6901(9)." The definition of "facility" under that section includes "(B) any site or area where a hazardous sub-

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[6] There is no question that a Canadian corporation can be held liable under CERCLA for conduct occurring in the United States. See *United States v. Ivey*, 747 F.Supp. 1235 (E.D. Mich. 1990).

stance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . ." Because the "Upper Columbia River Site" is the "facility" in this case, that would appear to rule out 42 U.S.C. § 9607(a)(1) or (2) as a basis for defendant's potential liability under CERCLA. Clearly, the defendant is not the "owner and/or operator" of the Upper Columbia River Site. Furthermore, no one argues that defendant has "transporter" liability under § 9607(a)(4). That leaves "generator" or "arranger" liability under § 9607(a)(3) with defendant being "any person who . . . otherwise arranged for disposal . . . of hazardous substances owned or possessed by such person . . . at any facility [the Upper Columbia River Site including Lake Roosevelt] owned or operated by another party or entity [the United States] and containing such hazardous substances."[7]

Defendant points out that the UAO does not specifically cite § 9607(a)(3) as the basis for defendant's potential liability under CERCLA. This is not surprising, however, since the UAO was issued pursuant to § 9606(a).[8] This is an "abatement action" which directs defendant to conduct a "Remedial Investigation/Feasibility Study" regarding the Upper Columbia River Site. The UAO reserves EPA's right

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7 "To accord CERCLA's liability provisions any meaning at all, the language 'containing such hazardous substances found in Section [9607(a)(3)] must be construed as referring to facilities that have been, by a depositor's actions, contaminated by waste." *State of New York v. General Elec. Co.*, 592 F.Supp. 291, 296 n. 9 (N.D.N.Y. 1984).

8 § 9606(b)(1) provides:

> Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

Of course, this is precisely what plaintiffs are attempting to do in this case.

to bring an action against defendant under § 9607 for recovery of any response costs incurred by the United States related to the Site and not reimbursed by the defendant. (UAO at p. 18).[9] If defendant were to comply with the UAO, it could seek reimbursement from the United States for doing so, provided it established by a preponderance of the evidence that it was not liable for response costs under § 9607(a). See 42 U.S.C. § 9606(b)(2)(A) and (C). § 9606(b)(2)(A) refers to "any person." As noted, the definition of "person" in §9601(21) does not distinguish between domestic and foreign corporations or individuals.

Defendant asserts it could not be an "arranger" because it did not "otherwise arrange" for disposal of hazardous substances "**by any other party or entity**, at any facility . . . owned or operated by another party or entity and containing such hazardous substances . . . ." (Emphasis added). The "plain language" of § 9607(a)(3) would appear to require another party, other than just the defendant, be involved in the disposal of the hazardous substances.[10] Defendant, however, does not cite a single case or any legislative history that has held that the involvement of another party or entity in the disposal is required for there to be "generator" or "arranger" liability. Indeed, defendant acknowledges that case law has declared the definition of "arranger" in CERCLA to be "inartful." *U.S. v. Iron Mountain Mine, Inc.*, 881 F.Supp. 1432, 1451 (E.D. Cal. 1995). "Arranger" is undefined in CERCLA.[11]

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9 The individual plaintiffs could also seek response costs under the "citizen suit" provision at 42 U.S.C. Section 9659(a).

10 Another party will be involved when there is a "contract" or an "agreement" for disposal. There is, however, the catch-all phrase "otherwise arranged for disposal."

11 "Congress did not, to say the least, leave the floodlights on to illuminate the trail to the intended meaning of arranger status and liability." *United States v. New Castle County*, 727 F.Supp. 854, 871 (D. Del. 1989). Legislative history "sheds little light" on the intended meaning of

There is authority supporting the proposition that a third-party is not required for "arranger" liability. In *State of Colorado v. Idarado Mining Co.*, 707 F.Supp. 1227 (D. Colo. 1989) , the defendants were held liable because they "otherwise arranged . . . for disposal" of hazardous waste by placing their contaminated tailings in the San Miguel River and those tailings "[had] come to be located" at the Society Turn area. *Id.* at 1241. In *National Railroad Passenger Corp. v. New York Housing Authority*, 819 F.Supp. 1271, 1277 (S.D.N.Y. 1993), the court found there was "arranger" liability where asbestos-containing material was flaking from the defendant's buildings onto the railroad tracks located below.

Courts have construed "generator" and "arranger" liability expansively. Thus, in *EPA v. TMG Enterprises*, 979 F.Supp. 1110, 1122-23 (W.D. Ky. 1997), the court stated:

> Although the phrase 'arranged for' is not defined in the statute and CERCLA's legislative history sheds scant light on its intended meaning, courts have concluded that a liberal judicial interpretation is consistent with CERCLA's 'overwhelmingly remedial' statutory scheme. [Citation omitted]. Furthermore, courts consistently have construed this phrase so as to promote CERCLA's dual goals: to allow the government to respond promptly and effectively to problems resulting from hazardous waste disposal and to allow recovery of clean-up costs from those responsible for creating the problem.

To that end, "[i]n the absence of a contract or agreement, the court must look to the totality of the circumstances, including any 'affirmative acts to dispose' to determine

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[Footnote continued from previous page]
the phrase. *United States v. Aceto Agr. Chemicals Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989).

whether a transaction involved an arrangement for disposal." *Id.* at 1123. A defendant cannot escape generator liability simply because it does not choose the ultimate destination of its waste. *Acme Printing Ink Co. v. Menard*, 881 F.Supp. 1237, 1250 (E.D. Wis. 1995). Furthermore, arranger liability "may attach even though the defendant did not know the substances would be deposited at a particular site or in fact believed they would be deposited elsewhere." *Pierson Sand & Gravel Inc. v. Pierson Township*, 851 F.Supp. 850, 855 (W.D. Mich. 1994). "[C]ontrol is not a necessary factor in every arranger case [and] [t]he Court must consider the totality of the circumstances . . . to determine whether the facts fit within CERCLA's remedial scheme." *Coeur d'Alene Tribe v. Asarco, Inc.*, 280 F.Supp.2d 1094, 1131 (D. Idaho 2003). Congress did not limit the definition of "disposal" to the initial introduction of hazardous material into the environment. *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1342 (9th Cir. 1992). Based on these authorities, "generator" and/or "arranger" liability under CERCLA cannot be ruled out for defendant. That, however, is, not a finding this court needs to make at this time and which can be litigated, if necessary, at a later date.

Defendant contends that if plaintiffs' "arranger" interpretation is extended to foreign corporations, it would produce the "absurd" result that the same conduct by the same corporation would, while not resulting in liability to that corporation as an "owner or operator," result in liability as an "arranger" and no coverage for that corporation under the "federally permitted release" provision of CERCLA at 42 U.S.C. § 9607(j). The court is not persuaded that the language of CERCLA or its legislative history is conclusive that a foreign corporation cannot be liable as an owner and/or operator under either § 9607(a)(1) and /or § 9607(a)(2). Nor is the court persuaded that the lack of coverage under § 9607(j) for a foreign corporation manifests congressional intent that

CERCLA was not intended to apply to foreign corporations whose conduct has adverse effects within the United States.

§ 9607(a)(1) refers to "the owner and operator of a vessel or a facility." The term "owner or operator" means "in the case of an onshore facility or an offshore facility, any person owning or operating such facility." § 9601(20)(A). "Offshore facility" means "any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a pubic vessel." § 9601(17). "Onshore facility" means "any facility of any kind located in, on, or under, any land or non-navigable waters within the United States." § 9601(18). Although § 9607(a)(1), pertaining to current owners and operators, does not contain the "any person" language, § 9607(a)(2), pertaining to past owners or operators, contains that language and also refers to "any facility" ("any person who at the time of the disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of"). Defendant concedes the definition of "facility" at § 9601(9) includes no geographical limitation, but asserts its component terms "on-shore facility" and "offshore" facility "**appear** to exhaust the possibilities for that category" and are separately defined in the statute as being limited to facilities located in or subject to the jurisdiction of the United States" (emphasis added). One has to ask that if "on-shore facility" and "offshore facility" are the only possible "facilities" under § 9607(a)(1) and/or (2), why have a separate definition of "facility" at § 9601(9) which makes no reference to the definitions of "offshore facility" and "on-shore facility" found at §§ 9601(17) and (18) and instead broadly defines "facility" without geographical limitation?

Even assuming Congress intended a geographic limitation on "facility" for current owner/operator liability under § 9607(a)(1) and perhaps also for past owner/operator liabil-

ity under § 9607(a)(2), while not for "arranger" liability under § 9607(a)(3), the court is not convinced that is an "absurd" result considering CERCLA is concerned with "domestic conditions" in the United States.[12] The case at bar is a prime example. What plaintiffs seek to remedy by way of the UAO is not what is happening right now and what has happened in the past at defendant's "facility" in Canada with regard to the disposal of hazardous substances into the Columbia River at that location. What plaintiffs seek to remedy is the result of that practice which has manifested itself at a "facility" within the territorial boundaries of the United States. Certainly, it is true this remedy may have the incidental effect of altering defendant's future disposal practices at its "facility" in Trail, B.C., but that does not change the essential fact that what plaintiffs are attempting to do is remedy an existing condition at a "facility" (the Upper Columbia River Site) wholly within the U.S. In other words, plaintiffs are not attempting to tell Canada how to regulate defendant's disposal of hazardous substances into the Columbia River, simply that they expect defendant to assist in cleaning up a mess in the United States which has allegedly been caused by those substances. Plaintiffs' use of CERCLA is not intended to supersede Canadian environmental regulation of the defendant. Canada's environmental laws are intended to protect Canadian territory, including the 10 miles from Trail, B.C. to the U.S. border. Those laws do nothing to remedy the damage that has already occurred in U.S. territory as a result of defendant's disposal of hazardous substances into the Columbia River.

Plaintiffs assert Congress' intent that foreign polluters of U.S. territory be held liable under CERCLA is apparent from legislative history of amendments made to the definition of liable parties. Plaintiffs note that as originally enacted, CER-

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12 This is quite a large assumption considering CERCLA's language and sparse legislative history.

CLA provided that the owner and operator of a vessel was liable under CERCLA only if "otherwise subject to the jurisdiction of the United States," but that the Superfund Amendments and Reauthorization Act of 1986 ("SARA") deleted the language "otherwise subject to the jurisdiction of the United States.," "making it clear that liability under CERCLA applies to releases from foreign vessels." *A&P H.R. Conf. Rep.* 99-962 (Oct. 3, 1986). "[F]oreign flag vessels not otherwise under United States jurisdiction are subject to liability under section 107 of CERCLA." *A&P House. Rep.* 99-253(I) (August 1, 1985). Defendant notes, however, that the amendment simply clarified that "foreign vessels not otherwise under United States jurisdiction **that release hazardous substances in areas subject to United States jurisdiction** are subject to liability under section 107 of CERCLA." *SARA Leg. History 32, Section by Section Analysis at 72 (House Energy and Commerce Committee Report,* 99-253, Part I) (emphasis added). According to defendant, the amendment made it clear that a foreign ship in U.S. waters could be held liable under CERCLA for a spill which "is no different than the liability finding for the Canadian owner of a Michigan waste site."

Defendant, however, cites no legislative history indicating Congress specifically limited liability to foreign vessels in U.S. waters that spill hazardous substances in those waters, as opposed to foreign vessels located outside U.S. waters who spill hazardous substances which eventually make their way into U.S. waters. The language quoted above ("foreign vessels not otherwise under United States jurisdiction that release hazardous substances in areas subject to United States jurisdiction") could just as logically refer to a foreign vessel outside U.S. waters that releases hazardous substances which eventually make their way into "areas (waters) subject to United States jurisdiction." That is no different than the situation here with a facility located on Canadian soil dumping hazardous substances into the Columbia River

which eventually make their way downstream into an area (the "Upper Columbia River Site") subject to United States jurisdiction.

42 U.S.C. § 9607(j), the "federally permitted release" provision, addresses a situation where the release of contaminants is the subject of regulation under another federal statute (i.e., the Clean Air Act, the Clean Water Act, etc.) and provides that if a facility is operating in compliance with its permit, recovery of response costs or damages, if any, with respect to such releases will be dealt with under existing law (the permit regime rather than CERCLA). § 9607(j) states: "Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section."

Defendant notes that its Trail smelter is not and could not be regulated under U.S. statutes (such as the Clean Air Act, the Clean Water Act, etc.) and therefore, would not be able to obtain an EPA permit for discharges to the Columbia River. Instead, the Trail smelter is regulated by Canadian environmental agencies under permits issued by Canadian statutes, and CERCLA does not provide for recognition of the regulatory regime governing the operation of the smelter or any other regulatory regime adopted by a foreign country. Thus, defendant asserts that under CERCLA, a U.S. facility discharging metal-bearing waste into a river in the U.S. in compliance with its Clean Water Act permit "could avoid any CERCLA liability," while a facility in Canada or Mexico, "even if operating under the same or more stringent permit standards, would continue to be subject to CERCLA joint and several liability for the whole cleanup if even a small amount of its discharges should reach the same river in the United States." According to defendant, "the vast net of CERCLA liability would supplant the source country's regulation of its industrial and municipal waste, wherever and

however, such waste reached or threatened to reach the U.S. side of the United States/Canada border."

Plaintiffs observe that having a "federally permitted release," while a defense to an action for response costs and damages, is not a defense to a CERCLA clean-up order such as in the case at bar. With regard to liability for response costs and damages under CERCLA, there may indeed be circumstances where there is unequal treatment of a facility in the U.S. discharging waste into the river versus a facility located in Canada discharging waste in the river which happens to make its way to the U.S.[13] There is not, however, unequal treatment as a general matter because even if the U.S. facility with the "federally permitted release" is not subject to CERCLA liability, it still is potentially liable under another statute such as the Clean Air Act or the Clean Water Act. As defendant admits, 42 U.S.C. § 9607(j) is not a "free pass to pollute." The facility located in Canada is rightly subject to liability under CERCLA to clean up contamination it has caused within the United States because Canada's own laws and regulations will not compel the Canadian facility to clean up the mess in the United States which it has created. As plaintiffs aptly put it: "EPA is not, through issuance of the UAO, attempting to control [defendant's] ongoing operations, or address any hazardous substances attributable to its operations which may be found in Canadian soil, water, air or sediment." Furthermore, "[a]ny Canadian discharge permit issued to [defendant] for its Trail operations necessarily considers only the impact on the approximately ten miles of river between [defendant's] facility and the Canadian border, and not the impacts on territory located in the US, where the impacts of [defendant's] past releases [are] most significant."

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[13] As the amici point out, there would not be unequal treatment with regard to hazardous waste deposited before the existence of the permit regime. Plaintiffs allege defendants' discharge of hazardous waste since 1906 has resulted in the contamination of the Upper Columbia River Site.

Defendant asserts that CERCLA treats foreign claimants to the Superfund less favorably than domestic claimants and therefore, this evidences that Congress did not intend extra-territorial application of CERCLA. As noted above, 42 U.S.C. § 9606(b)(2)(A) provides that "any person" who complies with an order issued under § 9606(a) may petition for reimbursement from the Superfund for the reasonable costs of such action, plus interest.[14] The definition of "person" in CERCLA (§ 9601(21)) does not distinguish between foreign and domestic individuals or corporations.

Defendant submits that foreign claimants are limited to submitting their claims pursuant to 42 U.S.C. § 9611(l), but the court is not persuaded. § 9611(l) provides:

> To the extent that the provisions of this chapter permit, a foreign claimant may assert a claim to the same extent that a United States claimant may assert a claim if--
>
> (1) the release of a hazardous substance occurred (A) in the navigable waters or (B) in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident;
>
> (2) the claimant is not otherwise compensated for his loss;
>
> (3) the hazardous substance was released from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under the Outer Continental Shelf Lands Act, as amended . . . or the Deepwater Port Act of 1974, as amended . . . ; and

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[14] If the petition is not granted, the "person" can sue the President in the appropriate United States district court seeking reimbursement from the Superfund. 42 U.S.C. § 9606(b)(2)(B).

> (4) recovery is authorized by a treaty or an executive agreement between the United States and foreign country involved, or if the Secretary of State, in consultation with the Attorney General and other appropriate officials certifies that such country provides a comparable remedy for United States claimants.

§ 9611(l) pertains to a different situation than under § 9606(b)(2). § 9611(l) provides a mechanism for foreign claimants, who are not in any way "responsible" for a release of hazardous substances, to seek reimbursement from the Superfund for costs incurred in responding to the release of such substances in the navigable waters or in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident, where the release was from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under U.S. law (the Outer Continental Shelf Lands Act or the Deepwater Port Act). § 9611(l) pertains to releases outside the U.S. as opposed to releases within the U.S. which, of course, is the situation in the case at bar. *See ARC Ecology*, 294 F.Supp.2d at 1158.

Defendant observes that CERCLA's "citizen suit" provision did not require the individual plaintiffs to give notice to Canada or British Columbia of intent to sue, although it did require them to give such notice to the United States and the State of Washington. 42 U.S.C. § 9659(d)(1). Furthermore, pursuant to § 9659(g), only the United States or the State, if not a party, may intervene as a matter of right in a "citizen suit."[15] The court does not consider that significant in deter-

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15 "United States" and "State" include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction. 42 U.S.C. § 9601(27).

mining whether Congress intended extraterritorial application of CERCLA. There is no dispute that Canada and British Columbia have been made aware of the subject UAO and this subsequent litigation, presumably because defendant told them of these matters. While CERCLA does not allow British Columbia or Canada to intervene as a matter of right, they could seek permissive intervention. CERCLA's limiting intervention as a matter of right to the United States and the States makes sense because the contamination at issue is within the United States and the State of Washington.

There is no direct evidence that Congress intended extraterritorial application of CERCLA to conduct occurring outside the United States. There is also no direct evidence that Congress did not intend such application. There is, however, no doubt that Congress intended CERCLA to clean up hazardous substances at sites within the jurisdiction of the United States. That fact, combined with the well-established principle that the presumption against extraterritorial application generally does not apply where conduct in a foreign country produces adverse effects within the United States, leads the court to conclude that extraterritorial application of CERCLA is not precluded in this case. The Upper Columbia River Site is a "domestic condition" over which the United States has sovereignty and legislative control. Extraterritorial application of CERCLA in this case does not create a conflict between U.S. laws and Canadian laws.

In *Tamari v. Bache & Co.*, cited *supra* at fn. 3, the Seventh Circuit found nothing in the Commodities Exchange Act (CEA) or its legislative history to indicate Congress did not intend the CEA to apply to foreign agents, but recognizing there also was no direct evidence that Congress intended such application, relied on the "conduct" and "effects" tests in discerning whether it had subject matter jurisdiction over the dispute. The court concluded it did have jurisdiction over causes of action arising from trading on U.S. exchanges, even though the parties were nonresident aliens (Lebanese) and the

contacts between them occurred in a foreign country (Lebanon). Said the court:

> The transmission of commodity future orders to the United States would be an essential step in the consummation of any scheme to defraud through futures trading on United States exchanges. Further, when transactions initiated by agents abroad involve trading on United States exchanges, the pricing and hedging functions of the domestic markets are directly implicated, just as they would be by an entirely domestic transaction. If transactions are the result of fraudulent representations, unauthorized trading or mismanagement of trading accounts, prices and trading volumes in the domestic marketplace will be artificially influenced, and public confidence in the markets could be undermined.
>
> By asserting jurisdiction under the conduct and effects rationales, the purposes of the Act are advanced. Were we to construe the CEA as inapplicable to the foreign agents of commodity exchange members when they facilitate trading on domestic exchanges, the domestic commodity futures market would not be protected from the negative effects of fraudulent transactions originating abroad. Because the fundamental purpose of the Act is to ensure the integrity of the domestic commodity markets, we expect that Congress intended to proscribe fraudulent conduct associated with any commodity future transactions executed on a domestic exchange, regardless of the location of the agents that facilitate the trading.

730 F.2d at 1108.

The same rationale applies here. Because the fundamental purpose of CERCLA is to ensure the integrity of the domestic environment, we expect that Congress intended to proscribe conduct associated with the degradation of the environment, regardless of the location of the agents responsible for said conduct.

III. CONCLUSION

The court has subject matter jurisdiction under CERCLA. The court has personal jurisdiction over the defendant and the exercise of said jurisdiction is reasonable. Plaintiffs' complaints state claims under CERCLA upon which relief can be granted. Therefore, defendant's Motion To Dismiss (Ct. Rec. 6) is **DENIED.**

THE COURT CERTIFIES THIS MATTER FOR AN IMMEDIATE APPEAL TO THE NINTH CIRCUIT COURT OF APPEALS ON THE BASIS THAT THE ORDER ISSUED BY THIS COURT "INVOLVES A CONTROLLING QUESTION OF LAW AS TO WHICH THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION AND THAT AN IMMEDIATE APPEAL FROM THE ORDER MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION." 28 U.S.C. §1292(b).

IT IS SO ORDERED. The District Executive is directed to enter this order and forward copies to counsel.

DATED this 8th of November, 2004.

s/ Alan A. McDonald
ALAN A. McDONALD
Senior United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; STATE OF WASHINGTON, Plaintiffs – Appellees, v. TECK COMINCO METALS, LTD., A Canadian corporation, Defendant - Appellant.	No. 05-35153 D.C. No. CV-04-00256-AAM Eastern District of Washington, Spokane ORDER

Before: GOULD and BERZON, Circuit Judges, and SCHWARZER,* District Judge.

The Petition for Rehearing is DENIED.

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.

APPENDIX D

42 U.S.C. § 9601. Definitions

For purpose of this subchapter—

. . .

(8) The term "environment" means

(A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. 1801 et seq.], and

(B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

(9) The term "facility" means

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or

(B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

. . .

(22) The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the envi-

ronment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) . . . .

42 U.S.C. § 9606. Abatement actions

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b) Fines; reimbursement

(1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

(2)

(A) Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President

for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607 (a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 9607 (a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate

costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of title 28.

42 U.S.C. § 9607. Liability

(a) Covered persons . . .

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604 (i) of this title. . . .

42 U.S.C. § 9613. Civil proceedings

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607 (a) of this title, during or following any civil action under section 9606 of this title or under section 9607 (a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9659. Citizens suits

(a) Authority to bring civil actions

Except as provided in subsections (d) and (e) of this section and in section 9613 (h) of this title (relating to timing of judicial review), any person may commence a civil action on his own behalf—

(1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any

standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter (including any provision of an agreement under section 9620 of this title, relating to Federal facilities); or

(2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter, including an act or duty under section 9620 of this title (relating to Federal facilities), which is not discretionary with the President or such other officer.

Paragraph (2) shall not apply to any act or duty under the provisions of section 9660 of this title (relating to research, development, and demonstration).

APPENDIX E

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10

IN THE MATTER OF: UPPER COLUMBIA RIVER SITE	UNILATERAL ADMINISTRATIVE ORDER FOR REMEDIAL INVESTIGATION/FEASIBILITY STUDY
Teck Cominco Metals, Ltd.,	U.S. EPA Region 10 CERCLA Docket No. CERCLA-10-2004-0018
Respondent	Proceeding Under Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §9606(a)

I. INTRODUCTION AND JURISDICTION

1. This Administrative Order ("Order") is being issued by the U.S. Environmental Protection Agency to Teck Cominco Metals, Ltd. (hereinafter "Teck Cominco" or "Respondent"). The Order concerns the preparation and performance of a Remedial Investigation/Feasibility Study ("RI/FS") as described in the attached Statement of Work

("SOW") (Attachment 1) at the Upper Columbia River Site (the "Site") in eastern Washington.

2. This Order is issued pursuant to the authority vested in the President of the United States by Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9606(a) as amended ("CERCLA"), and delegated to the Administrator of the United States Environmental Protection Agency ("EPA") by Executive Order No. 12580, January 23, 1987, 52 Fed. Reg. 2923, as amended by Executive Order No. 13016, August 30, 1996, 61 Fed. Reg. 45871, further delegated to the Regional Administrators by EPA Delegation Nos. 14-14-A and 14-14-B and further redelegated to the Director, Office of Environmental Cleanup by Regional Delegations dated February 1, 2002, and October 5, 1998, respectively.

3. In issuing this Order, the objectives of EPA are: (a) to determine the nature and extent of contamination and the threat to the public health or welfare or the environment caused by the release or threatened release of hazardous substances, pollutants or contaminants at or from the Site; and (b) to determine and evaluate alternatives for remedial action to prevent, mitigate or otherwise respond to or remedy any release or threatened release of hazardous substances, pollutants or contaminants at or from the Site.

4. The activities conducted under this Order are subject to approval by EPA. The activities under this Order shall be conducted in accordance with all applicable EPA guidances, policies, and procedures.

II. FINDINGS OF FACT

1. For purposes of this Order, the Upper Columbia River Site consists of the areal extent of contamination in the United States associated with the Upper Columbia River, and all suitable areas in proximity to the contamination necessary for implementation of response action. The Upper Columbia River is the principal inflow, contributing about 90% of the

flow from a large drainage area in Canada and the United States to Franklin D. Roosevelt Lake (Lake Roosevelt), the reservoir behind Grand Coulee Dam. Approximately 15 river miles south of the U.S.-Canada border, the river becomes characteristic of a lake/reservoir due to the Grand Coulee Dam.

2. The reservoir was developed into a major recreational and economic resource for the surrounding area attracting more than one million visitors per year. Recreational use of the area has been extensive including activities such as fishing, swimming, camping, and boating. The Upper Columbia River and surrounding area is also habitat to wildlife, plants, a varied fish community, and other aquatic species, including species protected under the Endangered Species Act (ESA).

3. The Confederated Tribes of the Colville Indian Reservation (Colville Tribes) and the Spokane Tribe of Indians (Spokane Tribe) own reservation lands along the Upper Columbia River. The Colville Tribes and the Spokane Tribe have treaty-reserved rights and resources, and/or other rights, interests, or resources in the Site. The Colville Tribes petitioned EPA in August 1999, pursuant to Section 105 of CERCLA 42 U.S.C. § 9605, to conduct an assessment of hazardous substance contamination along the Columbia River extending approximately 150 river miles from the U.S.-Canada border to the Grand Coulee Dam.

4. EPA began conducting the site assessment in October 1999. EPA selected a Site Assessment Area from approximately river mile 745 near the U.S.-Canada border to river mile 675. This area is called the Upper Columbia River Site Assessment Area (Assessment Area). In conducting the site assessment, EPA found contaminants at the Upper Columbia River Site including, but not limited to, heavy metals such as arsenic, cadmium, copper, lead, mercury and zinc. EPA did not conduct an analysis for dioxin and furan in the Assessment Area, though these contaminants remain a concern.

EPA also observed the presence of slag, a by-product of the smelting furnaces, containing glassy ferrous granules and other metals, at beaches and other depositional areas at the Assessment Area.

5. The Site has been the subject of numerous studies by various governmental entities. Sources identified in these studies include releases from mining and milling operations, fertilizer production, smelting operations, pulp and paper production, sewage treatment plants, and other industrial activities.

6. Contaminants found at the Site are known to be toxic to humans and aquatic life. Routes of human exposure to slag and contaminated sediment include direct contact with slag on the beaches of the Upper Columbia River, contact with contaminated sediment during low draw down periods, inhalation of airborne particles, dermal contact, and ingestion. There is also a concern of human exposure from ingestion of lake/river water contaminated as a result of contact with slag or contaminated sediments. Consumption of fish, aquatic resources, native plants, and agricultural crops are also potential routes of human exposure.

7. Potential environmental effects of slag discharged to the Upper Columbia River include both chemical (increased metal loads, potential bioaccumulation, toxicity problems in biota) and physical (scouring of plants and animals from river substrates, severe erosion of fish gills, smothering of habitat) components. Some benthic organisms can accumulate toxins that are attached to sediment particles that the benthic organism ingests. Toxins accumulated in benthic organisms can be transferred up the food chain to higher predators such as fish.

8. EPA completed its site assessment in March 2003. Pursuant to the Hazard Ranking System, published as a federal regulation on December 14, 1990 (55 Fed. Reg. 51532), the Site received a hazardous ranking score above 28.50,

making the Site eligible for listing on EPA's National Priorities List (NPL). Currently, the Site is being considered by EPA for possible inclusion on the NPL.

9. Respondent owns and operates an integrated smelting and refining complex in Trail, British Columbia (hereinafter referred to as the "Trail Smelter") situated approximately 10 river miles north of the U.S.-Canada border. Respondent has arranged for the disposal of its hazardous substances from the Trail Smelter into the Upper Columbia River by directly discharging up to 145,000 tonnes of slag annually prior to mid-1995. Effluent, such as slag, was discharged into the Columbia River through several outfalls at the Trail Smelter. The slag contains metals including, but not limited to, copper, lead, and zinc. The slag was carried downstream in the passing river current and settled in slower flowing quiescent areas. Effluent continues to be discharged from the Trail Smelter into the Columbia River.

10. The Trail Smelter facility also produces a variety of sulfur products and agricultural fertilizers which represent a potential source of mercury. Historically, the Trail Smelter discharged sulfur dioxide into the air increasing its discharge of sulfur dioxide from 4,700 tons a month to 10,000 tons a month in 1925. At that time, citizens of the town of Northport, Washington, situated just south of the U.S.-Canada border in the Columbia River valley, complained to local and state officials that pollution from the Trail smelter was threatening their health and environment.

11. After the Site scored above a 28.50 on the HRS, EPA began to evaluate proposing the Site on the NPL for the purpose of obtaining federal funding for evaluation and future cleanup of the Site. At this time, Teck Cominco American Inc. ("TCAI") approached EPA and the surrounding local county governments expressing a willingness to perform an independent, limited human health study at the Site if EPA would delay proposing the Site for NPL listing.

12. EPA expressed its interest in working with Teck Cominco, in coordination with the State, Tribes, and local governments, in delaying a listing by entering a Superfund Alternative Agreement with Teck Cominco, in accordance with EPA's guidance on Response Selection and Enforcement Approach for Superfund Alternative Sites, issued June 24, 2002 ("SAS guidance"). Under EPA's SAS guidance, EPA may enter settlements at sites that require long-term response and are eligible to be placed on the NPL, but are not yet listed, as long as EPA takes steps to ensure equivalency in the absence of an NPL listing. For example, it is critical to ensure that settlements covering these response actions achieve cleanup levels equivalent to those required at NPL sites, and that EPA, tribes, states and natural resource trustees are in an equivalent enforcement posture as they would be if the site were listed.

13. EPA worked for eleven months discussing the Superfund Alternative approach with Teck Cominco, and performed an extensive outreach effort to coordinate with all the interested stakeholders, describing the process that would be necessary to postpone listing the Site on the NPL. Of critical importance under EPA's Superfund Alternative Sites guidance is that Teck Cominco must enter an agreement with EPA to perform a RI/FS of the Upper Columbia River Site. The Colville and Spokane Tribes, and Washington State, supported EPA postponing its listing of the Site as long as Teck Cominco agreed to all of the criteria outlined in EPA's Superfund Alternative Sites guidance.

14. After months of inconclusive discussions and ambiguous commitments from TCAI, EPA issued a Special Notice Letter and draft Administrative Order on Consent ("AOC") to Respondent on October 10, 2003, formally requesting the company to voluntarily commit to an AOC for an RI/FS under CERCLA authorities. Consistent with Section 122(e) of CERCLA, 42 U.S.C. § 9622(e), the Special

Notice Letter triggered a 60 day moratorium, and invited Respondent to participate in formal negotiations with EPA.

15. TCAI responded to EPA's Special Notice Letter on behalf of Respondent. At all times relevant to these discussions, EPA agreed that TCAI could sign the RI/FS AOC for the Site as long as Respondent agreed to sign the tolling agreement with the relevant natural resource trustees.

16. EPA and TCAI spent approximately six weeks negotiating the terms for performing an acceptable RI/FS at the Site. Although TCAI expressed a repeated willingness to perform a human health and ecological risk assessment at the Site, under a legally binding contract with any RI/FS at the Site under CERCLA authorities.

17. As a result, EPA concluded that the proposed study that TCAI was willing to perform would not provide the necessary information for EPA to select a remedy that would be protective of human health and the environment. EPA and TCAI ended negotiations on November 26, 2003. EPA wrote TCAI on December 9, 2003, again informing TCAI that the Special Notice Letter Negotiation Moratorium was ended.

18. EPA concluded that TCAI's proposed study would not provide the necessary information for EPA to select a remedy that was protective of human health and the environment because:

a. TCAI would not agree to address environmental and human health cleanup standards in its proposed study;

b. TCAI's proposal was limited to a study of risk only, and used ambiguously defined approaches to address site characterization, data gap analysis, fate and transport issues and alternatives analysis;

c. TCAI proposed a contractual agreement that redefined basic and reliable tenets of the CERCLA RI/FS process so that it was impossible to identify, or later enforce, what

work TCAI was agreeing to perform (e.g., TCAI insisted that its proposed study, called a Human Health/Ecological Risk Assessment, constituted an entire RI/FS study, even though a human health/ecological risk assessment is only one component of EPA's RI/FS process);

d. TCAI would not agree to preserve the rights for trustees to file claims for natural resource damages in the same manner that all US companies in this situation must do.

e. TCAI committed to conduct work only "in general accordance" with EPA Superfund guidance.

III. CONCLUSIONS OF LAW AND DETERMINATIONS

1. The Upper Columbia River Site is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

2. Wastes and constituents thereof at the Site, sent to the Site, disposed of at the Site, and/or transported to the Site identified in Section II are "hazardous substances" as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), or constitute "any pollutant or contaminant" that may present an imminent and substantial danger to public health or welfare under Section 104(a)(1) of CERCLA, 42 U.S.C. § 9604(a)(1).

3. The presence of hazardous substances at the Site or the past, present, or potential migration of hazardous substances currently located at or emanating from the Site, constitute actual and/or threatened "releases" as defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

4. The actual or threatened release of one or more hazardous substances from the Site may present an imminent and substantial endangerment to the public health or welfare or the environment.

5. Respondent is a "person" as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

6. Respondent is a responsible party under Sections 104, 107, and 122 of CERCLA, 42 U.S.C. §§ 9604, 9607, and 9622.

7. The RI/FS required by this Order is necessary to abate an imminent and substantial endangerment because of an actual or threatened release of hazardous substances from the Site and protect the public health or welfare or the environment, is in the public interest, not inconsistent with CERCLA and the NCP, and will expedite effective remedial action.

IV. NOTICE TO THE STATE

On December 8, 2003, prior to issuing this Order, EPA notified the State of Washington Department of Ecology ("DOE") that EPA would be issuing this Order.

V. ORDER

Based on the foregoing, Respondent is hereby ordered to comply with the following provisions, including, but not limited to all attachments to this Order, all documents incorporated by reference into this Order, and all schedules and deadlines in this Order, attached to this Order, or incorporated by reference into this Order.

VI. DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in the statute or its implementing regulations. Whenever terms listed below are used in this Order or in the documents attached to this Order or incorporated by reference into this Order, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 et seq.

b. "Day" shall mean a calendar day unless otherwise specified. In computing any period of time under this Order, in the event that a submission would fall on a Saturday, Sunday, or U.S. federal holiday, the period shall run until the end of the next business day.

c. "DOE" shall mean the Washington State Department of Ecology and any successor departments or agencies of the State of Washington.

d. "EPA" shall mean the United States Environmental Protection Agency.

e. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

f. "National Contingency Plan" or "NCP" shall mean the National Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, including any amendments thereto.

g. "Order" shall mean this Unilateral Administrative Order and all appendices attached hereto. In the event of conflict between this Order and any attachments, this Order shall control.

h. "Paragraph" shall mean a portion of this Order identified by an Arabic numeral.

i. "Parties" shall mean EPA and Respondent.

j. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, et seq. (also known as the Resource Conservation and Recovery Act).

k. "Respondent" shall mean Teck Cominco Metals, Ltd.

l. "Section" shall mean a portion of this Order identified by a Roman numeral and includes one or more paragraphs.

m. "State" shall mean the State of Washington.

n. "Statement of Work" or "SOW" shall mean the statement of work for implementation as set forth in Attachment 1 to this Order. The Statement of Work is incorporated into this Order and is an enforceable part of this Order.

o. "Site" for purposes of this Order shall mean the Upper Columbia River Site that consists of the areal extent of contamination in the Upper Columbia River in the United States, and all suitable areas in the United States in proximity to the contamination necessary for implementation of response action. The Upper Columbia River is the principal inflow, contributing about 90% of the flow from a large drainage area in Canada and the United States, to Franklin D. Roosevelt Lake (Lake Roosevelt), the reservoir behind Grand Coulee Dam. Approximately 15 river miles south of the U.S.-Canada border, the river becomes characteristic of a lake/reservoir due to the Grand Coulee Dam. The Site will include all areas in the United States where hazardous substances from Respondent's Trail operations have migrated or materials containing hazardous substances have come to be placed. The boundaries of the Site will be determined upon the issuance of EPA's Record of Decision after the Remedial Investigation/Feasibility Study is complete.

p. "United States" shall mean the United States of America.

q. "Work" shall mean all activities Respondent is required to perform under this Order, including any activities described in the SOW.

VII. NOTICE OF INTENT TO COMPLY

Respondent shall provide, not later than ten (10) days after the effective date of this Order, written notice to EPA's Remedial Project Manager ("RPM") stating whether it will

comply with the terms of this Order. If Respondent does not perform the Work, EPA may seek to enforce the terms of this Order pursuant to Sections 106(b) and 107(c)(3) of CERCLA. Respondent's written notice shall describe, using facts that exist on or prior to the effective date of this Order, any "sufficient cause" defenses asserted by Respondent under Sections 106(b) and 107(c)(3) of CERCLA. The absence of a response by EPA to the notice required by this Paragraph shall not be deemed to be acceptance of Respondent's assertions.

VIII. PARTIES BOUND

1. This Order shall apply to and be binding upon Respondent and upon its directors, officers, employees, agents, successors, and assigns. No change in the ownership, corporate status, or other control of any of the entities referenced in this Paragraph shall alter any of Respondent's responsibilities under this Order.

2. Respondent shall provide a copy of this Order to any prospective owners or successors before a controlling interest in Respondent's assets, property rights, or stock are transferred to the prospective owner or successor. Respondent shall provide a copy of this Order to each contractor, subcontractor, laboratory, or consultant retained to perform any Work under this Order, within five (5) days after the effective date pursuant to Section XXVI of this Order or on the date such services are retained, whichever date occurs later. Respondent shall also provide a copy of this Order to each person representing Respondent with respect to the Site or the Work and shall condition all contracts and subcontracts entered into hereunder upon performance of the Work in conformity with the terms of this Order. With regard to the activities undertaken pursuant to this Order, each contractor and subcontractor shall be deemed to be related by contract to Respondent within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3). Notwithstanding the

terms of any contract, Respondent is responsible for compliance with this Order and for ensuring that its contractors, subcontractors and agents comply with this Order, and perform any Work in accordance with this Order.

IX. WORK TO BE PERFORMED

1. Respondent shall cooperate with EPA in providing information regarding the Work to the public. As requested by EPA, Respondent shall participate in the preparation of such information for distribution to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Site.

2. All aspects of the Work to be performed by Respondent pursuant to this Order shall be under the direction and supervision of a qualified project manager the selection of which shall be subject to approval by EPA. Within twenty (20) days after the effective date of this Order, Respondent shall notify EPA in writing of the name and qualifications of the project manager, including primary support entities and staff, proposed to be used in carrying out Work under this Order. If at any time Respondent proposes to use a different project manager, Respondent shall notify EPA and shall obtain approval from EPA before the new project manager performs any Work under this Order.

3. EPA will review Respondent's selection of a project manager according to the terms of Section IX Paragraph 2 of this Order. If EPA disapproves of the selection of the project manager, Respondent shall submit to EPA within five (5) days after receipt of EPA's disapproval of the project manager previously selected, a list of project managers, including primary support entities and staff, that would be acceptable to Respondent. EPA will thereafter provide written notice to Respondent of the names of the project managers that are acceptable to EPA. Respondent may then select any approved project manager from that list and shall notify EPA of the

name of the project manager selected within twenty-one (21) days of EPA's designation of approved project managers.

4. Respondent shall conduct the RI/FS and submit deliverables as provided by the Statement of Work ("SOW"), Attachment 1. All such work shall be conducted in accordance with CERCLA, the NCP, and EPA guidance including, but not limited to, the "Interim Final Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA" (OSWER Directive #9355.3-01), "Guidance for Data Usability in Risk Assessment" (OSWER Directive #9285.7-05) and guidances referenced therein, and guidances referenced in the SOW, as may be amended or modified by EPA. The tasks that Respondent must perform are described more fully in the SOW. The activities and deliverables identified below shall be developed as provided in the SOW, and shall be submitted to EPA as provided. All work performed under this Order shall be in accordance with the schedules herein, and in full accordance with requirements of the SOW, as initially approved or modified by EPA, and as may be amended or modified by EPA from time to time.

5. REMEDIAL INVESTIGATION/FEASIBILITY STUDY

a. The overall purpose of the RI/FS is to investigate and determine the full nature and horizontal and vertical extent of contamination at the Upper Columbia River Site, including all areas where contamination or contaminated material from Respondent's Trail facility has migrated or come to be placed, to develop and evaluate potential remedial alternatives that will prevent, mitigate or otherwise respond to or remedy any release or threatened release of hazardous substances, pollutants or contaminants at or from the Site and that will be protective of human health and the environment. Respondent shall perform, at a minimum, all actions necessary to implement the work described in the SOW.

b. Work Plan and Implementation

i. As part of the work described in Section IX Paragraph 5 and in the SOW, the Respondent must submit a schedule for implementation of the required activities which shall include specific initiation and completion dates, and draft and final document submittal dates. The Respondent shall submit to EPA for review and comment work plans for performing the RI/FS activities set forth below and in the SOW. The work plans shall provide a description of, and a schedule for, the RI/FS activities required by this Order.

ii. EPA may approve, disapprove, require revisions to, or modify any work plan. If EPA requires revisions to any work plan, the Respondent shall submit a revised work plan within fifteen (15) days of receipt of EPA's notification of the required revisions. The Respondent shall implement each work plan as approved by EPA in accordance with the schedule approved by EPA. Once approved, or approved with modifications, each work plan, schedule, and any subsequent modifications shall be fully enforceable under this Order. The Respondent shall give EPA at least fourteen (14) days advanced notice of all field work or field activities to be performed by Respondent pursuant to Section IX Paragraph 5 of this Order.

iii. Respondent shall not commence or undertake any subsequent activities or tasks until receiving EPA approval for the RI/FS Work Plan.

iv. EPA reserves the right to stop Respondent from proceeding further, either temporarily or permanently, on any task, activity or deliverable at any point during the RI/FS.

v. Respondent shall assure that all work performed, samples taken and analyses conducted pursuant to Section IX Paragraph 5 of this Order, conform to the requirements of the RI/FS Work Plan and the EPA-approved quality assurance project plan (QAPP). Respondent shall assure that field per-

sonnel used by Respondent are properly trained in the use of field equipment and in chain of custody procedures.

c. Reporting. All work plans, reports, notices and other documents required to be submitted to EPA under this Order shall be sent by certified mail, return receipt requested, by overnight delivery or by courier. Respondent shall submit to EPA three (3) hard copies, one of which shall be unbound, and one (1) electronic copy of all work plans, reports, or other submissions required by this Order and the SOW. In preparation for the Scoping Meeting, within forty-five (45) days of this Order, Respondent shall provide a document detailing Existing Site Information, as required under Task 1 of the SOW. At the RI/FS Scoping meeting pursuant to Section IX Paragraph 5, EPA will provide Respondent with a list of additional state and peer review contacts that Respondent shall provide copies of all plans, reports or other submissions which are required by this Order, at the same time that Respondent makes the submission to EPA.

d. Scoping Meeting. Within sixty (60) days of the effective date of this Order, Respondent shall meet with EPA to discuss RI/FS Scoping Activities under Task 1, of the SOW. During the Scoping Meeting, appropriate deliverable dates for the tasks and deliverables outlined in the SOW will be determined.

e. Within thirty (30) days of the RI/FS Scoping Activities meeting, Respondent shall submit a Site Management Plan ("SMP") for the RI/FS to EPA. The SMP shall contain the project scope, general management approach and schedule for submittal of all workplans and documents pursuant to the SOW. If EPA disapproves of or requires revisions to the SMP, in whole or in part, Respondent shall amend and submit to EPA a revised SMP which is responsive to the directions in all EPA comments, within fifteen (15) days of receiving EPA's comments.

6. In the event that Respondent amends or revises a report, plan or other submittal upon receipt of EPA comments, if EPA in its discretion subsequently disapproves of the revised submittal or any portion thereof, or if subsequent submittals do not fully reflect EPA's directions for changes related to performance of the RI/FS, EPA retains the right, in its sole discretion, to seek statutory penalties, perform its own studies, complete the RI/FS (or any portion of the RI/FS) under CERCLA and the NCP, and seek reimbursement from the Respondent for its costs; and/or seek any other appropriate relief.

7. In the event that EPA takes over some of the tasks, but not the entire RI/FS, Respondent shall incorporate and integrate information supplied by EPA into the final RI/FS report, as applicable.

8. Neither failure of EPA to expressly approve or disapprove of Respondent's submissions within any time period, nor the absence of comments, shall be construed as approval by EPA.

9. Respondent shall, no less than ten (10) days prior to any off-site shipment of hazardous substances from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving state and to EPA's RPM of such shipment of hazardous substances within the time frame given in the SOW. However, the notification of shipments shall not apply to any such off-site shipments when the total volume of such shipments will not exceed 10 cubic yards.

a. The notification shall be in writing, and shall include the following information: (1) the name and location of the facility to which the hazardous substances are to be shipped; (2) the type and quantity of the hazardous substances to be shipped; (3) the expected schedule for the shipment of the hazardous substances; and (4) the method of transportation. Respondent shall notify the receiving state of any major

change in the shipment plan, such as a decision to ship the hazardous substances to another facility within the same state, or to a facility in another state.

b. The identity of the receiving facility and state will be determined by Respondent following the award of the contract for any phase of the Work. Respondent shall provide to EPA all information on the off-site shipments, including but not limited to, all information included in Section IX Paragraph 9. a. Respondent shall provide the off-site shipment information as soon as practical after the award of the contract and before the hazardous substances are actually shipped.

c. All hazardous substances, pollutants or contaminants removed off-site pursuant to this Order for treatment, storage, or disposal shall be treated, stored, or disposed of at a facility in compliance, as determined by EPA, pursuant to 42 U.S.C.§ 9621(d)(3) and the off-site rule at 40 C.F.R. 300.440. Regional Offices will provide information on the acceptability of a facility under section 121(d)(3) of CERCLA and the rule.

X. MODIFICATION OF THE WORK PLANS

1. Modifications to any plan or schedule or the attached EPA SOW may be made in writing by the RPM or at their oral direction. If the RPM makes an oral modification, it will be memorialized in writing within two (2) days by the RPM; provided, however, that the effective date of the modification shall be the date of the RPM's oral direction. The rest of the Order, or any other portion of the Order may only be modified in writing by signature of the delegated signatory or designee of EPA Region 10.

2. If Respondent seeks permission to deviate from any approved plan or schedule or SOW, Respondent's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis.

3. No informal advice, guidance, suggestion, or comment by EPA regarding reports, plans, specifications, schedules, or any other writing submitted by the Respondent shall relieve the Respondent of its obligation to obtain such formal approval as may be required by this Order, and to comply with all requirements of this Order unless it is formally modified.

XI. ADDITIONAL RESPONSE ACTIONS

If EPA determines that additional response actions not included in an approved plan are necessary to protect public health, welfare, or the environment, EPA will notify Respondent of that determination. Unless otherwise stated by EPA, within fifteen (15) days of receipt of notice from EPA that additional response actions are necessary to protect public health, welfare, or the environment, Respondent shall submit for approval by EPA a Work Plan for the additional response actions. The plan shall conform to the applicable requirements of this Order and the SOW to this Order. Upon EPA's approval of the plan, Respondent shall implement the plan for additional response actions in accordance with the provisions and schedule contained therein. This Section does not alter or diminish the RPM's authority to make oral or written modifications to any plan or schedule pursuant to Section X of this Order.

XII. FINAL REPORTS, PROPOSED PLANS, RECORD OF DECISION AND ADMINISTRATIVE RECORD

1. EPA shall be responsible for the release to the public of the final reports on the RI/FS. EPA shall be responsible for the preparation and release to the public of the proposed plan and Record of Decision in accordance with CERCLA and the NCP.

2. EPA shall provide Respondent with the final reports on the RI/FS as well as any Record of Decision.

3. EPA will determine the contents of the Administrative Record file for selection of any response action. The Administrative Record file shall include those materials cited in 40 C.F.R. 300.810. Respondent must submit to EPA all documents concerning the Site, developed during the course of the RI/FS which must be included in the Administrative Record file pursuant to 40 C.F.R. 300.810. EPA may require Respondent to establish a community information repository at or near the Site, to house one copy of the Administrative Record.

XIII. PROGRESS REPORTS

In addition to the deliverables set forth in this Order, Respondent shall provide to EPA monthly progress reports no later than the 10th day of the following month. At a minimum, with respect to the preceding month, these progress reports shall: (1) describe the actions which have been taken to comply with this Order during that month; (2) include all results of sampling and tests and all other data received by Respondent; (3) describe work planned for the next two months with schedules relating such work to the overall project schedule for the Work; and (4) describe all problems encountered and any anticipated problems, any actual or anticipated delays, and solutions developed and implemented to address any actual or anticipated problems or delays.

XIV. SAMPLING, ACCESS, AND DATA AVAILABILITY/ADMISSIBILITY

1. All sampling and analyses performed pursuant to this Order shall conform to EPA direction and approval regarding sampling, quality assurance/quality control (QA/QC), data validation, and chain of custody procedures. Respondent shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance. Respondent shall follow the following documents as appropriate as guidance for QA/QC and sampling: "EPA Requirements for Quality Assurance Project

Plans" (QA/R-5) (120KB)–March 2001, EPA/240/B-01/003; "Guidance on Choosing a Sampling Design for Environmental Data Collection" (G-5S) (1046KB), December 2002, EPA/240/R-02/005.

2. Upon request by EPA, Respondent shall have such a laboratory analyze samples submitted by EPA for quality-assurance monitoring. Respondent shall provide to EPA the quality assurance/quality control procedures followed by all sampling teams and laboratories performing data collection and/or analysis. Respondent shall only use laboratories that have a documented quality system which complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995) and "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditations Program (NELAP) as meeting the quality system requirements.

3. Upon request by EPA, the Respondent shall allow EPA or its authorized representatives to take split and/or duplicate samples. The Respondent shall notify EPA at least fifteen (15) days in advance of any sample collection activity, unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Respondent to take split or duplicate samples of any samples it takes as part of its oversight of Respondent's implementation of the Work

4. Respondent may assert a claim of business confidentiality covering part or all of the information submitted to EPA pursuant to the terms of this Order under 40 C.F.R. Section 2.20, provided such claim is allowed by Section 104(e)(7) of CERCLA, 42 U.S.C. Section 9604(e)(7). This claim shall be asserted in the manner described by 40 C.F.R.

Section 2.203(b) and substantiated at the time the claim is made. Information determined to be confidential by EPA will be given the protection specified in 40 C.F.R. Part 2. If no such claim accompanies the information when it is submitted to EPA, it may be made available to the public by EPA or the state without further notice to Respondent. Respondent agrees not to assert confidentiality claims with respect to any data related to Site conditions, sampling, or monitoring.

5. Respondent shall provide and/or obtain access to the Site and off-Site areas owned and/or controlled by Respondent, to which access is necessary to implement this Order, and provide access to all records and documentation related to the conditions at the Site and the action conducted pursuant to this Order. Such access shall be provided to EPA employees, contractors, agents, consultants, designees, representatives, and State of Washington representatives. These individuals shall be permitted to move freely at the Site and appropriate off-site areas in order to conduct actions which EPA determines to be necessary.

6. If the Site, the off-Site area, or other property subject to or affected by the cleanup, or where documents required to be prepared or maintained by this Order are located, is controlled or owned in whole or in part by parties other than Respondent, Respondent will obtain, or use their best efforts to obtain, access agreements from such parties. Such agreements shall provide access for EPA, its contractors and oversight officials, the State and its contractors, and Respondent or Respondent's authorized representatives and contractors, and such agreements shall specify that Respondent is not EPA's representative with respect to liability associated with Site activities. Copies of such agreements shall be provided to EPA prior to Respondent's initiation of field activities. Respondent's best efforts shall include providing reasonable compensation to any off-Site property owner.

7. If access agreements are not obtained within the time referenced above, Respondent shall immediately notify EPA in writing of its failure to obtain access. EPA may use its legal authorities to obtain access for Respondent, may perform those tasks or activities requiring access with EPA contractors, or may terminate the Order if Respondent cannot obtain access agreements. If EPA performs those tasks or activities requiring access with EPA contractors and does not terminate the Order, Respondent shall perform all other activities not requiring such access. Respondent shall integrate the results of any such tasks undertaken by EPA into its reports and deliverables. EPA reserves the right to seek cost recovery for all costs and attorney fees incurred by the United States to obtain access for Respondent.

8. Notwithstanding any provision of this Order, the United States retains all of its access authorities and rights under CERCLA and any other applicable statutes or regulations.

XV. RECORD PRESERVATION

Respondent shall preserve all records and documents in its possession that relate in any way to the Site during the conduct of Work required by this Order and for a minimum of ten (10) years after commencement of construction of any response action. Respondent shall acquire and retain copies of all documents that relate to the site and are in the possession of its employees, agents, accountants, contractors, or attorneys. After this ten (10) year period, Respondent shall notify EPA at least ninety (90) days before the documents are scheduled to be destroyed. If EPA requests that the documents be saved, Respondent shall, at no cost to EPA, give EPA the documents or copies of the documents.

XVI. ENDANGERMENT AND EMERGENCY RESPONSE

1. In the event of any action or occurrence during the performance of the Work which causes or threatens to cause a release of a hazardous substance or which may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action to prevent, abate, or minimize the threat, and shall immediately notify EPA's RPM. If the RPM is unavailable Respondent shall notify the EPA Office of Emergency Response, Region 10 Duty Officer at (800) 424-8802 or (206) 553-1263 of the incident or Site conditions. Respondent shall take such action in consultation with EPA's RPM and in accordance with all applicable provisions of this Order, including but not limited to the Health and Safety Plan. In the event that Respondent fails to take appropriate response action as required by this Section, and EPA takes that action instead, EPA reserves the right to seek reimbursement from Respondent for all costs incurred by the United States.

2. In addition, in the event of any reportable release of a hazardous substance from the Site, Respondent shall immediately notify the Emergency Response Duty OSC at (206) 553-1263 and the National Response Center at (800) 424-8802. Respondent shall submit a written report to EPA within seven (7) days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

3. Nothing in the preceding Paragraph shall be deemed to limit any authority of the United States to take, direct, or

order all appropriate action to protect human health and the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances on, at, or from the Site.

XVII. EPA REVIEW OF SUBMISSIONS

1. After review of any deliverable, plan, report or other item which is required to be submitted for review and approval pursuant to this Order, EPA may: (a) approve the submission; (b) approve the submission with modifications; (c) disapprove the submission and direct Respondent to resubmit the document after incorporating EPA's comments; or (d) disapprove the submission and assume responsibility for performing all or any part of the response action. As used in this Order, the terms "approval by EPA," "EPA approval," or a similar term means the action described in Subparagraphs (a) or (b) of this Paragraph.

2. In the event of approval or approval with modifications by EPA, Respondent shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA.

3. Upon receipt of a notice of disapproval pursuant to Section XVII Paragraph 1(c) of this Order or a request for a modification pursuant to Section XVII Paragraph 1(b), Respondent shall, within fifteen (15) days or such longer time as specified by EPA, correct the deficiencies and resubmit the plan, report, or other item for approval. Notwithstanding the notice of disapproval, or approval with modifications, Respondent shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission.

4. If any submission is disapproved by EPA pursuant to Section XVII, Paragraph 1(d) of this Order, Respondent shall be deemed to be in violation of this Order.

XVIII. COMPLIANCE WITH APPLICABLE LAWS

1. All activities by Respondent pursuant to this Order shall be performed in accordance with the requirements of all federal and state laws and regulations. EPA has determined that the activities contemplated by this Order are consistent with the NCP.

2. Respondent shall perform all actions required pursuant to this Order in accordance with all applicable local, tribal, state, and federal laws and regulations except as provided in CERCLA section 121(e) and 40 C.F.R. section 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-site actions required pursuant to this Order shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements (ARARs) under federal environmental, state environmental, tribal environmental, or facility siting laws. Respondent shall identify ARARs in the Work Plan subject to EPA approval.

3. This Order is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

XIX. REMEDIAL PROJECT MANAGER

1. All communications, whether written or oral, from Respondent to EPA shall be directed to EPA's RPM. Respondent shall submit to EPA three (3) copies of all documents, including plans, reports, and other correspondence, which are developed pursuant to this Order, and shall send these documents by certified mail, return receipt requested or overnight delivery. Documents shall also be provided in electronic format.

EPA's RPM is: Sally Thomas
EPA Project Coordinator
Environmental Cleanup Office
U.S. Environmental Protection Agency

Region 10
1200 Sixth Avenue, Mail Code ECL-113
Seattle, Washington 98101
(206) 553-2102

2. EPA has the unreviewable right to change its RPM. If EPA changes its RPM, EPA will inform Respondent in writing of the name, address, and telephone number of the new RPM.

3. EPA's RPM shall have the authority lawfully vested in the RPM, by the National Contingency Plan, 40 C.F.R. Part 300. EPA's RPM shall have authority, consistent with the National Contingency Plan, to halt any work required by this Order, and to take any necessary response action.

XX. DELAY IN PERFORMANCE

1. Any delay in performance of Work required under this Order that, in EPA's judgment, is properly justified by Respondent under the terms of this Section shall not be considered a violation of this Order. Any delay in performance of a specific task required under this Order shall not affect Respondent's obligations to fully perform all other obligations under the terms and conditions of this Order.

2. Respondent shall notify EPA of any delay or anticipated delay in performing any requirement of this Order. Such notification shall be made by telephone to EPA's RPM, as appropriate, within 48 hours after Respondent first knew or should have known that a delay might occur. Respondent shall adopt all reasonable measures to avoid or minimize any such delay. Within five (5) business days after notifying EPA by telephone, Respondent shall provide written notification fully describing the nature of the delay, any justification for delay, any reason why Respondent should not be held strictly accountable for failing to comply with any relevant requirements of this Order, the measures planned and taken to minimize the delay, and a schedule for implementing the measures that will be taken to mitigate the effect of the delay.

EPA may, in its sole and unreviewable discretion, grant an extension of any schedule for good cause shown. Increased costs or expenses associated with implementation of the activities called for in this Order are not a justification for any delay in performance.

XXI. ASSURANCE OF ABILITY TO COMPLETE WORK

1. Within thirty (30) days after approval of any Work Plan for any response action, Respondent shall demonstrate its ability to complete the Work specified by the Work Plan and to pay all claims that arise from the performance of such Work by obtaining and presenting to EPA one of the following: (1) a performance bond; (2) a letter of credit; (3) a guarantee by a third party; or (4) internal financial information to allow EPA to determine that Respondent has sufficient assets available to perform the Work. Respondent shall demonstrate financial assurance in an amount no less than the estimate of cost for the response actions described in the Work Plan. If Respondent seeks to demonstrate ability to complete the response actions by means of internal financial information, or by guarantee of a third party, it shall re-submit such information annually. If EPA determines that such financial information is inadequate, Respondent shall, within thirty (30) days after receipt of EPA's notice of determination, obtain and present to EPA for approval one of the other three forms of financial assurance listed above.

2. At least seven (7) days prior to commencing any Work at the Site pursuant to this Order, Respondent shall submit to EPA a certification that Respondent or its contractors and subcontractors have adequate insurance coverage or have indemnification for liabilities for injuries or damages to persons or property which may result from the activities to be conducted by or on behalf of Respondent pursuant to this Order. Respondent shall ensure that such insurance or in-

demnification is maintained for the duration of the Work required by this Order.

XXII. UNITED STATES NOT LIABLE

The United States, by issuance of this Order, assumes no liability for any injuries or damages to persons or property resulting from acts or omissions by Respondent, or its directors, officers, employees, agents, representatives, successors, assigns, contractors, or consultants in carrying out any action or activity pursuant to this Order. Neither EPA nor the United States may be deemed to be a party to any contract entered into by Respondent or its directors, officers, employees, agents, successors, assigns, contractors, or consultants in carrying out any action or activity pursuant to this Order.

XXIII. ENFORCEMENT AND RESERVATIONS

1. EPA reserves the right to bring an action against Respondent under Section 107 of CERCLA, 42 U.S.C. § 9607, for recovery of any response costs incurred by the United States related to the Site and not reimbursed by Respondent. This reservation shall include but not be limited to past costs, direct costs, indirect costs, the costs of oversight, the costs of compiling the cost documentation to support oversight cost demand, as well as accrued interest as provided in Section 107(a) of CERCLA.

2. Notwithstanding any other provision of this Order, at any time during the response action, EPA may perform its own studies, complete the response action (or any portion of the response action) as provided in CERCLA and the NCP, and seek reimbursement from Respondent for its costs, or seek any other appropriate relief.

3. Nothing in this Order shall preclude EPA from taking any additional enforcement actions, including modification of this Order or issuance of additional Orders, and/or additional remedial or removal actions as EPA may deem necessary, or from requiring Respondent in the future to perform

additional activities pursuant to CERCLA, 42 U.S.C. § 9606(a), et seq., or any other applicable law. Respondent shall be liable under CERCLA Section 107(a), 42 U.S.C. § 9607(a), for the costs of any such additional actions.

4. Notwithstanding any provision of this Order, the United States hereby retains all of its information gathering, inspection and enforcement authorities and rights under CERCLA, RCRA and any other applicable statutes or regulations.

5. As provided in Section 106(b) of CERCLA, 42 U.S.C. § 9606(b), any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under Section 106(a) may, in an action brought in the appropriate United States district court to enforce such order, be fined not more that $27,500 for each day in which such violation occurs or such failure to comply continues. Moreover, under Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), "[i]f any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action."

6. Nothing in this Order shall constitute or be construed as a release from any claim, cause of action or demand in law or equity against any person for any liability it may have arising out of or relating in any way to the Site.

7. If a court issues an order that invalidates any provision of this Order or finds that Respondent has sufficient cause not to comply with one or more provisions of this Order, Respondent shall remain bound to comply with all provisions of this Order not invalidated by the court's order.

XXIV. ADMINISTRATIVE RECORD

The Administrative Record file supporting these response actions is available for review at EPA Region 10 offices located at 1200 6th Avenue, Seattle, Washington.

XXV. OPPORTUNITY TO CONFER

1. Respondent may, before the effective date of this Order, request a conference with EPA to discuss this Order. If requested, the conference shall occur within seven (7) days of Respondent's request for a conference.

2. The purpose and scope of the conference shall be limited to issues regarding Respondent's compliance with the Order, implementation of the Work required by this Order and Respondent's intentions with respect to compliance with this Order. This conference is not an evidentiary hearing, and does not constitute a proceeding to challenge this Order. It does not give Respondent a right to seek review of this Order, or to seek resolution of potential liability, and no official stenographic record of the conference will be made. At any conference held pursuant to Respondent's request, Respondent may appear in person or be represented by an attorney or other representative.

3. Requests for a conference must be by telephone followed by written confirmation mailed that day to Cara Steiner-Riley, Assistant Regional Counsel, 1200 6th Ave., Seattle, WA 98101 at (206) 553-1142.

XXVI. EFFECTIVE DATE AND COMPUTATION OF TIME

This Order shall be effective twenty (20) days after the day it is received by Respondent, unless a conference is requested as provided herein. All times for performance of ordered activities shall be calculated from this effective date. If a conference is requested, this order shall be effective ten (10) days after the day of the conference unless modified in writing by EPA.

So Ordered, this 11th day of December, 2003.

By: /s/_____
Michael F. Gearheard, Director
Environmental Cleanup Office
Region 10
U.S. Environmental Protection Agency

EFFECTIVE DATE:_____

APPENDIX F

Canadian Embassy

Ambassador
Du Canada

Note No. 0001

The Embassy of Canada presents its compliments to the Department of State of the United States of America and has the honour to refer to the Unilateral Administrative Order (UAO) for Remedial Investigation/Feasibility Study issued on December 11, 2003 by the United States Environmental Protection Agency (EPA), Region 10 to Teck Cominco Metals Ltd. regarding the Columbia River in the State of Washington.

The Government of Canada is concerned that the EPA is attempting to enforce the U.S. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) on Teck Cominco Metals, a Canadian company operating in Canadian territory.

Canada does not believe that CERCLA applies to Teck Cominco Metals and is concerned that the issuance of the Unilateral Administrative Order may set an unfortunate precedent, by causing transboundary environmental liability cases to be initiated in both Canada and the United States.

Canada encourages the EPA to rescind the Unilateral Administrative Order and to re-examine the offer made by Teck Cominco to undertake an environmental and health risk

assessment. Canada hopes that the EPA and Teck Cominco Metals will work together to develop a mutually acceptable and enforceable agreement, in the spirit of the long history of joint Canadian-U.S. stewardship of our shared environment. The Embassy of Canada avails itself of this opportunity to renew to the Department of State of the United States of America the assurances of its highest consideration.

Washington, D.C.

January 3, 2004

APPENDIX G

BY FAX AND
COURIER

teckcominco

January 12, 2004

G. Leonard Manuel
Vice President & General Counsel
Direct Dial: (604) 685 3012
Faxcom: (604) 844 2509
Email: len.manuel@teckcominco.com

Mr. Michael F. Gearheard
Director, Environmental Cleanup Office
United States Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, Washington 98101
USA

Dear Mr. Gearheard:

Teck Cominco Metals Ltd. (TCML) has received and reviewed your letter of December 11, 2003, and the enclosed Unilateral Administrative Order (UAO) under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) directing TCML to perform a Remedial Investigation and Feasibility Study for the Upper Columbia River Site (Site), in conformance with an attached Scope of Work. That Site includes the Columbia River from the Grand Coulee Dam north to the US/Canada border. In issuing the UAO to TCML, EPA Region 10 alleges that contaminants, including slag, were discharged from TCML's Trail Smeller into the Columbia River. The Trail Smelter is located in Trail, British Columbia and the alleged discharges

occurred wholly within Canada. Although the UAO also alleges that numerous other facilities, both within and outside the United States, and owned or operated by persons other than TCML, have released hazardous substances at the Site, the UAO is directed solely to TCML.

As EPA has acknowledged, this effort to use CERCLA to attach liability based on discharges from a facility physically located outside the United States, and not otherwise subject to its jurisdiction, is unprecedented, and inconsistent with the cooperative approach taken by the United States and Canada in dealing with other situations involving transboundary pollution over the last century. We understand that the Canadian government has formally advised the United States that it opposes the extraterritorial application of CERCLA to facilities in Canada.

EPA's effort to expand the application of CERCLA outside the United States is also not supported by any reasonable reading of the language of CERCLA. Indeed, any contrary reading would leave foreign facilities, including those owned or operated by foreign governmental entities, subject to the vast, fully retroactive liability net of CERCLA with even fewer defenses than those available to domestic parties. Accordingly, TCML holds firmly to the view that the alleged discharges from the Trail Smelter provide no basis for issuing this UAO to TCML, or otherwise making TCML a liable party under CERCLA.

However, as we have also made clear to EPA Region 10 in our discussions over the past year, TCML is willing to assume voluntarily the costs of investigation of the alleged contamination from the Trail Smelter, and the costs of appropriately addressing risks from that contamination. In confirmation of that position, TCML encloses with this letter an enforceable agreement setting forth that commitment unequivocally, along with its commitment to address appropriately

risks to human health and the environment attributable to the Trail Smelter identified in the investigation.

We look forward to working with EPA to address contamination in the Upper Columbia River Site as promptly as possible in a responsible way, using sound science to identify and respond appropriately to the identified risks.

Yours truly,

/s/

G. Leonard Manuel
Vice President & General Counsel

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation, Plaintiffs, and TECK COMINCO METALS, LTD., a Canadian corporation, Defendant.	NO. **CV-04-0256-AM** COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND FOR CIVIL PENALTIES

I. INTRODUCTION

1.1 This action is brought under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, citizens suit provision, 42 U.S.C. § 9659(a)(1), to enforce the Unilateral Administrative Order for Remedial Investigation/Feasibility

Study ("UAO") issued to Teck Cominco Metals, Ltd. ("Teck Cominco"), Docket No. CERCLA 10-2004-0018, on December 11, 2003, by the United States Environmental Protection Agency ("EPA") pursuant to its authority under 42 U.S.C. § 9606(a).

II. PARTIES

2.1 Joseph A. Pakootas ("Pakootas") is an enrolled member of the Confederated Tribes of the Colville Reservation ("Tribes"), a sovereign Indian Tribe whose government is recognized by the United States, and a resident of Inchelium, Washington, located within the exterior boundaries of the Colville Reservation.

2.2 Donald R. Michel ("Michel") is an enrolled member of the Tribes and a resident of Inchelium, Washington, located within the exterior boundaries of the Colville Reservation.

2.3 Teck Comino is a Canadian corporation registered as an extra provincial company under the laws of British Columbia. Teck Cominco owns and operates the world's largest integrated lead-zinc smelting and refining complex in Trail, British Columbia, Canada ("Cominco Smelter"), located approximately 10 river miles north of the United States-Canada border ("Border").

III. JURISDICTION AND VENUE

3.1 This Court has jurisdiction of this citizens suit brought to enforce an order which has become effective pursuant to CERCLA, to order such action as may be necessary to correct the violation of the order, and to impose civil penalties. 42 U.S.C. § 9659(c).

3.2 Pursuant to 42 U.S.C. § 9659(d)(1), Plaintiffs provided notice of the alleged violations of the UAO and Plaintiffs' intent to sue to Teck Cominco, the Administrator of EPA, the United States Attorney General, the Attorney Gen-

eral of the State of Washington, and the Regional Administrator of EPA Region 10.

3.3 More than sixty (60) days have passed since notice was provided, and Teck Cominco continues to violate the UAO by refusing to comply with its provisions. To date, EPA has not taken action under CERCLA to enforce the UAO, and has neither commenced nor is diligently prosecuting a court action to redress this violation.

3.4 42 U.S.C. § 9659(b)(1) provides for venue in this Court.

IV. FACTUAL ALLEGATIONS

A. Teck Cominco Released Slag Containing Hazardous Substances into the Columbia River.

4.1 From approximately 1906 to mid-1995, Teck Cominco generated and disposed of certain hazardous substances in liquid and solid form, including, but not limited to arsenic, cadmium, copper, mercury, lead, and zinc (hereinafter, "slag") directly into the Columbia River. Prior to mid-1995, the Cominco Smelter discharged up to 145,000 tons of slag each year directly into the Columbia River. The slag generated and disposed of by Teck Cominco into the Columbia River is carried downstream into waters of the United States.

4.2 Over time a significant volume of slag and the hazardous substances contained therein have accumulated and cause continuing impacts to the surface water and ground water, sediments, and biological resources which comprise the Upper Columbia River and Franklin D. Roosevelt Lake ("Lake Roosevelt").

4.3 Technical evidence, including distinct time frame dated chemical and physical analyses of the characteristics of the slag obtained in core samples, shows with scientific certainty that the predominant source of slag in the Upper Columbia River and Lake Roosevelt originates from the

Cominco Smelter. Evidence shows that the physical and chemical decay of slag, and the subsequent release of trace elements in the form of arsenic, cadmium, cooper, zinc, and lead, is an ongoing process in the in the buried slag and sediment of the Upper Columbia River and Lake Roosevelt.

B. Teck Cominco Slag is Toxic to Humans and to Aquatic Life.

4.4 The contaminants deposited by Teck Cominco into the Columbia River and ultimately Lake Roosevelt are toxic to humans and to aquatic life. As stated in the UAO:

4.4.1 Humans are exposed to slag and contaminated sediment by direct contact with slag on the beaches of the Upper Columbia River and Lake Roosevelt, contact with contaminated sediment during low draw down periods, inhalation of airborne particles, dermal contact, and ingestion. In addition, humans are exposed from ingestion of water from the Upper Columbia River or Lake Roosevelt. and through consumption of fish, aquatic resources, native plants, and agricultural crops.

4.4.2 Environmental effects of slag include both chemical (increased metal loads, potential bioaccumulation, toxicity problems in biota) and physical (scouring of plants and animals in substrates, severe erosion of fish gills, smothering of habitat) components.

C. Teck Cominco Slag has Damaged and Continues to Damage Pakootas and Michel.

4.5 Pakootas and Michel live within the exterior boundaries of the Colville Reservation. The Colville Reservation is diverse with natural resources including the Upper Columbia River and Lake Roosevelt, standing timber, streams, lakes, minerals, native plants, fish, and wildlife.

4.6 Pakootas and Michel fish and recreate in the Columbia River and Lake Roosevelt. Pakootas and Michel walk along the beaches and camp on the shores of the Co-

lumbia River and Lake Roosevelt. These activities, of central importance to Pakootas' and Michel's subsistence, culture, and spiritual well-being, expose Pakootas and Michel to the hazardous contaminants discharged by Teck Cominco into the Columbia River.

4.7 Pakootas and Michel, as members of the Tribes, have expressly reserved hunting, fishing, and gathering rights and entitlements to the Columbia River that are impaired by Teck Cominco's discharge of hazardous slag into the Columbia River.

D. EPA Issued Teck Cominco a UAO Concerning the Preparation and Performance of a RI/FS at the Upper Columbia River Site.

4.8 On December 11, 2003, EPA issued Teck Cominco the UAO.

4.9 EPA is aware that Teck Cominco has violated and continues to violate CERCLA by failing to fulfill its obligation to comply with the UAO. In particular, EPA is aware, *inter alia*, that Teck Cominco has violated and continues to violate 42 U.S.C. § 9606(a) as follows:

4.9.1 Teck Cominco has failed to comply with the terms and conditions of the December 11, 2003, UAO. Teck Cominco's failure to comply with the UAO constitutes a violation of a condition, requirement, or order which has become effective under CERCLA.

4.9.2 Teck Cominco has failed to provide EPA with notice of its intent to comply with the terms of the UAO within ten days of the effective date of the UAO, in violation of § VII of the UAO. To the contrary, Teck Cominco unequivocally indicated its intent not to comply with the terms of the UAO by its January 12, 2004, letter dated from G. Leonard Manuel directed to Michael F. Gearheard. Teck Cominco's conduct constitutes a violation of a condition, requirement, or order which has become effective under CERCLA.

4.9.3 Teck Cominco has failed to perform the RI/FS and submit deliverables as provided in the Statement of Work, Attachment 1 to the UAO, in violation of § IX(4) of the UAO. Teck Cominco's conduct constitutes a violation of a condition, requirement, or order which has become effective under CERCLA.

4.10 EPA has failed to enforce the UAO. Enforcement of the UAO pursuant to CERCLA is necessary to protect the health and welfare of the Plaintiffs and the quality of the Reservation Environment from the adverse impacts resulting from the hazardous substances released by Teck Cominco into the Columbia River. Teck Cominco's failure to comply with the UAO adversely affects Pakootas and Michel.

4.11 Pursuant to 42 U.S.C. § 9659(d)(1), Pakootas and Michel provided notice of the alleged violations and of their intent to sue to Teck Cominco, the Administrator of EPA, the United States Attorney General, the Attorney General of the State of Washington, and the Regional Administrator of Region 10 EPA.

4.12 More than sixty days have passed since notice was served, and the violations complained of in the notice are continuing. Teck Cominco is in violation of the UAO. EPA has not commenced and diligently prosecuted a court action to redress this violation.

V. FIRST CLAIM FOR RELIEF: DECLARATORY RELIEF UNDER CERCLA

5.1 Pakootas and Michel reallege and incorporate by reference paragraphs 1.1 through 4.12.

5.2 Teck Cominco has violated and continues to violate CERCLA by failing to fulfill its obligation to comply with the UAO.

5.3 Pakootas and Michel are entitled to a declaration by this Court that Teck Cominco has violated and continues to

violate the UAO and accordingly, has violated and continues to violate CERCLA.

VI. SECOND CLAIM FOR RELIEF: INJUNCTIVE RELIEF UNDER CERCLA

6.1 Pakootas and Michel reallege and incorporate by this reference paragraphs 1.1 though 4.12.

6.2 Teck Cominco has violated and continues to violate CERCLA by failing to fulfill its obligation to comply with the UAO.

6.3 Pakootas and Michel are entitled to an order enforcing the UAO against Teck Cominco.

6.4 Pakootas and Michel are entitled to an order ordering such action as may be necessary to correct Teck Cominco's violations of the UAO and accordingly, violations of CERCLA.

VII. PRAYER FOR RELIEF

THEREFORE, having alleged the foregoing facts and causes of action against Teck Cominco, Pakootas and Michel pray for the following relief:

1. A declaration by the Court that Teck Cominco has violated and continues to violate CERCLA;

2. An order enforcing the UAO against Teck Cominco.

3. An order ordering such action as may be necessary to compel Teck Cominco to correct its violations of the UAO and accordingly, its violations of CERCLA.

4. An order requiring the payment of civil penalties to the maximum extent permitted by CERCLA for each day during which the violation of the UAO continues.

5. An order granting costs of litigation, including attorneys' fees, incurred in bringing this suit pursuant to 42 U.S.C. § 9659(f).

6. Such other and further relief as the Court deems just and equitable.

DATED July 20, 2004.

SHORT CRESSMAN & BURGESS PLLC

By /s/

Richard A. Du Bey, WSBA No. 8109
Paul J. Dayton, WSBA No. 12619
Connie Sue Martin, WSBA No. 26525
Beth M. Prieve, WSBA No. 34020
Attorneys for Plaintiffs Joseph A. Pakootas and Donald R. Michel

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation, Plaintiffs, v. TECK COMINCO METALS, LTD., a Canadian corporation, Defendant.	NO. CV-04-0256-AAM STATE OF WASHINGTON'S COMPLAINT IN INTERVENTION

I. INTRODUCTION

1.1 The State of Washington seeks to exercise its right under 42 U.S.C. § 9659(g) to intervene as plaintiff in the above-captioned matter on all questions of law and fact brought forth in the original Complaint. This action was brought by the Plaintiffs under the Comprehensive Environ-

mental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, citizen's suit provision, 42 U.S.C. § 9659(a)(1), to enforce the Unilateral Administrative Order for Remedial Investigation/Feasibility Study ("UAO") issued to Teck Cominco Metals, Ltd. ("Teck Cominco"), Docket No. CERCLA 10-2004-0018, on December 11, 2003, by the United States Environmental Protection Agency ("EPA") pursuant to its authority under 42 U.S.C. § 9606(a).

II. PARTIES

2.1 The State of Washington ("State") is a sovereign state of the United States through which the Columbia River flows, including that portion of the River known as Lake Roosevelt. The State has an inherent interest in the health and welfare of it citizens and is a natural resource trustee for the natural resources within the State, including the Columbia River and its associated fish and wildlife.

2.2 Joseph A. Pakootas ("Pakootas") is an enrolled member of the Confederated Tribes of the Colville Reservation ("Tribes"), a sovereign Indian Tribe whose government is recognized by the United States, and a resident of Inchelium, Washington, located within the exterior boundaries of the Colville Reservation.

2.3 Donald R. Michel ("Michel") is an enrolled member of the Tribes and a resident of Inchelium, Washington, located within the exterior boundaries of the Colville Reservation.

2.4 Teck Comino is a Canadian corporation registered as an extra provincial company under the laws of British Columbia. Teck Cominco owns and operates the world's largest integrated lead-zinc smelting and refining complex in Trail, British Columbia, Canada ("Cominco Smelter"), located approximately 10 river miles north of the United States-Canada border ("Border").

III. JURISDICTION AND VENUE

3.1 This Court has jurisdiction of this citizens suit brought to enforce an order which has become effective pursuant to CERCLA, to grant intervention of such parties as are provided by statute and law, and to order such action as may be necessary to correct the violation of the order, and to impose civil penalties. 42 U.S.C. § 9659(c).

3.2 42 U.S.C. § 9659(b)(1) provides for venue in this Court.

IV. FACTUAL ALLEGATIONS

A. The State seeks to intervene on the issues of fact set forth by Plaintiffs.

4.1 The State realleges and incorporates by reference those allegations of fact set forth in Plaintiffs' Complaint which are not unique to the establishment of Plaintiff's standing. Specifically, the State seeks intervention on and realleges the following:

1. Teck Cominco Released Slag Containing Hazardous Substances into the Columbia River.

4.2 From approximately 1906 to mid-1995, Teck Cominco generated and disposed of certain hazardous substances in liquid and solid form, including, but not limited to arsenic, cadmium, copper, mercury, lead, and zinc (hereinafter, "slag") directly into the Columbia River. Prior to mid-1995, the Cominco Smelter discharged up to 145,000 tons of slag each year directly into the Columbia River. The slag generated and disposed of by Teck Cominco into the Columbia River is carried downstream into waters of the United States.

4.3 Over time a significant volume of slag and the hazardous substances contained therein have accumulated and cause continuing impacts to the surface water and ground water, sediments, and biological resources which comprise

the Upper Columbia River and Franklin D. Roosevelt Lake ("Lake Roosevelt").

4.4 The predominant source of slag in the Upper Columbia River and Lake Roosevelt originates from the Cominco Smelter. Evidence shows that the physical and chemical decay of slag, and the subsequent release of trace elements in the form of arsenic, cadmium, copper, zinc, and lead, is an ongoing process in the buried slag and sediment of the Upper Columbia River and Lake Roosevelt.

2. Teck Cominco Slag is Toxic to Humans and to Aquatic Life.

4.5 The contaminants deposited by Teck Cominco into the Columbia River and ultimately Lake Roosevelt are toxic to humans and to aquatic life. As stated in the UAO:

4.5.1 Humans are exposed to slag and contaminated sediment by direct contact with slag on the beaches of the Upper Columbia River and Lake Roosevelt, contact with contaminated sediment during low draw down periods, inhalation of airborne particles, dermal contact, and ingestion. In addition, humans are exposed from ingestion of water from the Upper Columbia River or Lake Roosevelt. and through consumption of fish, aquatic resources, native plants, and agricultural crops.

4.5.2 Environmental effects of slag include both chemical (increased metal loads, potential bioaccumulation, toxicity problems in biota) and physical (scouring of plants and animals in substrates, severe erosion of fish gills, smothering of habitat) components.

3. EPA Issued Teck Cominco a UAO Concerning the Preparation and Performance of a RI/FS at the Upper Columbia River Site.

4.6 On December 11, 2003, EPA issued Teck Cominco the UAO.

4.7 EPA is aware that Teck Cominco has violated and continues to violate CERCLA by failing to fulfill its obligation to comply with the UAO. In particular, EPA is aware, *inter alia*, that Teck Cominco has violated and continues to violate 42 U.S.C. § 9606(a) as follows:

4.7.1 Teck Cominco has failed to comply with the terms and conditions of the December 11, 2003, UAO. Teck Cominco's failure to comply with the UAO constitutes a violation of a condition, requirement, or order which has become effective under CERCLA.

4.7.2 Teck Cominco has failed to provide EPA with notice of its intent to comply with the terms of the UAO within ten days of the effective date of the UAO, in violation of § VII of the UAO. To the contrary, Teck Cominco unequivocally indicated its intent not to comply with the terms of the UAO by its letter dated January 12, 2004, from G. Leonard Manuel directed to Michael F. Gearheard. Teck Cominco's conduct constitutes a violation of a condition, requirement, or order which has become effective under CERCLA.

4.7.3 Teck Cominco has failed to perform the RI/FS and submit deliverables as provided in the Statement of Work, Attachment 1 to the UAO, in violation of § IX(4) of the UAO. Teck Cominco's conduct constitutes a violation of a condition, requirement, or order which has become effective under CERCLA.

4.8 EPA has failed to commence and diligently prosecute an action under CERCLA to require compliance with the UAO.

B. CERCLA grants the State the automatic right to intervene.

4.9 This matter was brought by Plaintiffs pursuant to CERCLA's citizen's suit provision, 42 U.S.C. § 9659(a)(1), to enforce the UAO issued to Defendant. The subject of the UAO, Lake Roosevelt, lies within Washington's borders. Under CERCLA, the Unites States and the State have an ab-

solute statutory right to intervene in any action brought pursuant to the citizen's suit provision. 42 U.S.C.A. § 9659(g). Therefore movant is entitled to intervene as a matter of right.

V. FIRST CLAIM FOR RELIEF: DECLARATORY RELIEF UNDER CERCLA

5.1 The State realleges and incorporates by reference paragraphs 1.1 through 4.9, and seeks intervention on the claims for relief set forth in Plaintiffs' Complaint. Specifically, the State seeks the following relief:

5.2 Teck Cominco has violated and continues to violate CERCLA by failing to fulfill its obligation to comply with the UAO.

5.3 Plaintiffs are entitled to a declaration by this Court that Teck Cominco has violated and continues to violate the UAO and accordingly, has violated and continues to violate CERCLA.

VI. SECOND CLAIM FOR RELIEF: INJUNCTIVE RELIEF UNDER CERCLA

6.1 Teck Cominco has violated and continues to violate CERCLA by failing to fulfill its obligation to comply with the UAO.

6.2 Plaintiffs are entitled to an order enforcing the UAO against Teck Cominco.

6.3 Plaintiffs are entitled to an order requiring such action as may be necessary to correct Teck Cominco's violations of the UAO and accordingly, violations of CERCLA.

VII. PRAYER FOR RELIEF

THEREFORE, having realleged and sought intervention on the foregoing facts and causes of action against Teck Cominco, the State also seeks intervention on the relief prayed for by Plaintiffs. Specifically, the State prays for:

1. A declaration by the Court that Teck Cominco has violated and continues to violate CERCLA.

2. An order enforcing the UAO against Teck Cominco.

3. An order requiring such action as may be necessary to compel Teck Cominco to correct its violations of the UAO and accordingly, its violations of CERCLA.

4. An order requiring the payment of civil penalties to the maximum extent permitted by CERCLA for each day during which the violation of the UAO continues.

5. An order granting costs of litigation, including attorneys' fees, incurred in bringing this suit pursuant to 42 U.S.C. § 9659(f).

6. Such other and further relief as the Court deems just and equitable. DATED this 31st day of August, 2004.

CHRISTINE O. GREGOIRE
Attorney General

s/ Kristie E. Carevich
STEVEN J. THIELE, WSBA #20275
KRISTIE O. CAREVICH, WSBA #28018
Assistant Attorneys General

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State of Washington
(360) 586-6770

APPENDIX J

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

June 2, 2006

Mr. Doug H. Horswill
Senior Vice President
Teck Cominco Metals Ltd
600-200 Burrard Street
Vancouver, B.C. V6C 3L9
Canada

Re: Withdrawal of EPA's Unilateral Administrative Order for Remedial Investigation/Feasibility Study at the Upper Columbia River Site

Dear Mr. Horswill:

Pursuant to Paragraph 70 of the Settlement Agreement for Implementation of Remedial Investigation and Feasibility Study at the Upper Columbia River Site ("Settlement Agreement"), EPA Region 10 is withdrawing the Unilateral Administrative Order for Remedial Investigation/Feasibility Study, Docket No. CERCLA-10-2004-0018, issued to you on December 11, 2003.

Sincerely,
/s/
L. Michael Bogert
Administrator, EPA Region 10

cc: Ann Klee, EPA General Counsel
John Cruden, Deputy Assistant Attorney General
C. Bruce DiLuzio, Teck Cominco American Inc.